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No.____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

THOMAS LESTRANGE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether a handicapped applicant for employment may maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, where the primary objective of the employer's Federal financial assistance is unrelated to employment?

2. Whether a handicapped applicant for employment who cannot demonstrate a nexus between the denial of employment and a specific program supported by Federal financial assistance may nevertheless maintain an employment discrimination action under Section 504 of the Rehabilitation Act?

3. Whether a private right of action exists under Section 504 of the Rehabilitation Act?

PARTIES TO THE PROCEEDING

Petitioner Consolidated Rail Corporation respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 1, 1982. Respondent is Thomas LeStrange, a handicapped applicant for employment with Petitioner.[1]

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1. Pursuant to Rule 28.1 of the Rules of the Supreme Court, Petitioner herein discloses the following subsidiaries (except wholly owned subsidiaries) and affiliates of Consolidated Rail Corporation, with the percentage of stock interest held by Petitioner noted in parentheses: The Akron & Barberton Belt Railway Company (50%); Albany Port Railway Corporation (50%); The Belt Railway Company of Chicago (15.38%); Calumet Western Railway Company (25%; 50% of this company is owned by Indiana Harbor Belt Railroad Company, a subsidiary of Petitioner); The Canada Southern Railway Company (71.44%); Chicago & Western Indiana Railway Company (20%); Fruit Growers Express Company (23.52%); Indiana Harbor Belt Railroad Company (51%); The Lake Erie & Eastern Railroad Company (50%); The Lakefront Dock and Railroad Terminal Company (50%); The Monongahela Railway Company (33.33%); Nicholas, Fayette & Greenbrier Railroad Company (50%); Peoria & Pekin Union Railway Company (25.64%); Pittsburgh Chartiers & Youghiogheny Railway Company (50%); Terminal Railroad Association of St. Louis (12.5%); Toledo Terminal Railroad Company (42.87%); Trailer Train Company (4.78%).

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CITATION OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit has been reported at 687 F.2d 767 (3d Cir. 1982) and is included within the Appendix for Petitioner submitted herein, commencing at page A-1. The Opinion and Order of the United States District Court for the Middle District of Pennsylvania have not been reported and appear in the Appendix for Petitioner, commencing at page A-25. A prior Opinion and Order of the United States District Court for the Middle District of Pennsylvania are reproduced at page A-53 of Petitioner's Appendix and are reported at 501 F. Supp. 964 (M.D. Pa. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1982 (Appendix for Petitioner at page A-66). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §794, as amended Pub.L. 95-602, Title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987:

> Nondiscrimination under federal grants and programs; promulgation of rules and regulations
>
> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. §794a, Pub. L. 93-112, Title V, §505, as added Pub.L. 95-602, Title I, §120, Nov. 6, 1978, 92 Stat. 2982:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §2000d, Pub.L. 88-352, Title VI, §601, July 2, 1964, 78 Stat. 252:

Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d-3, Pub.L. 88-352, Title VI, §604, July 2, 1964, 78 Stat. 253:

> Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment
>
> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

20 U.S.C. §1681, Pub.L. 92-318, Title IX, §901, June 23, 1972, 86 Stat. 373:

> Sex
>
> Prohibition against discrimination; exceptions
>
> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

STATEMENT OF THE CASE

The Court of Appeals' decision involves the significant federal question of whether the mere receipt of Federal financial assistance by an employer, regardless of the nature, purpose and beneficiaries of such Federal financial assistance, is sufficient to enable a handicapped applicant for employment to maintain an employment discrimination action against the employer under Section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, 29 U.S.C. §794. This action was commenced on September 22, 1978 by Respondent Thomas LeStrange, who alleged that Petitioner Consolidated Rail Corporation ("Conrail") failed to employ him as a locomotive engineer by reason of his physical handicap, i.e. the amputation of his left hand and a portion of his left forearm. The jurisdiction of the District Court was invoked under, *inter alia*, Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794 ("Section 504").[2]

The facts pertinent to this Petition for a Writ of Certiorari are not in dispute. LeStrange was initially employed by the Erie Lackawanna Railway Company as a locomotive engineer. As a result of an accident unrelated to his employment (LeStrange Deposition of October 8, 1981, at 5), LeStrange suffered the amputation of his left hand and a portion of his left forearm in March, 1971. At that time, he was placed on disability or medical

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2. In his Amended Complaint filed on October 26, 1979, LeStrange also alleged that jurisdiction existed over Conrail with respect to his claims under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983, due to Conrail's status as an interstate common carrier. By order of November 4, 1980, Judge Rambo of the United States District Court for the Middle District of Pennsylvania granted Conrail's motion to dismiss these claims, but declined to dismiss any claims under Section 504 on the basis of the facts alleged in the amended complaint. *LeStrange v. Consolidated Rail Corporation*, 501 F. Supp. 964 (M.D. Pa. 1980).

leave and was awarded disability pay (LeStrange Dep. at 5). The Erie Lackawanna Railway Company declined to return him to service because of his inability to perform the job functions required of a locomotive engineer, and therefore he continued on disability leave. In 1978, despite having received disability benefits for seven years, LeStrange asked Conrail to consider him for employment as an engineer (LeStrange Dep. at 7).[3] LeStrange was examined by a physician on April 4, 1978 and was classified as not qualified for employment on May 2, 1978. LeStrange was dissatisfied with this finding and brought the instant suit. Subsequently, he was afforded the opportunity to participate in a field test administered by Conrail on February 15, 1979 to determine his ability to perform the duties of a locomotive engineer. LeStrange could not satisfactorily complete the test, but was offered a second opportunity to do so. LeStrange refused to cooperate and declined Conrail's offer. 501 F. Supp. at 966.

In his Amended Complaint, LeStrange alleged that jurisdiction existed over Conrail with respect to Section 504 by reason of Conrail's receipt of Federal financial assistance. There is no dispute in the instant matter that Conrail has received federal funding through the purchase of securities pursuant to Section 216 of the Regional Rail Reorganization Act of 1973, 45 U.S.C. §726 ("Rail Act"). In addition, Conrail has received federal funding through reimbursement for employee protective

3. Conrail disputes LeStrange's allegation that Conrail became the successor-in-interest of the Erie Lackawanna Railway Company upon the enactment of the Regional Rail Reorganization Act, 45 U.S.C §701 *et seq*. In fact, Conrail was conveyed certain rail properties of northeast rail carriers in reorganization on April 1, 1976, ". . . free and clear of any liens or encumbrances . . ." 45 U.S.C. §743(b)(2). This has been interpreted to mean that Conrail is not a successor to employment-related claims against those rail carriers in reorganization. *Howard v. Penn Central Transportation Co.*, 87 F.R.D. 342 (N.D. Ohio 1980). Respondent's cause of action, if any, arose subsequent to April 1, 1976.

benefits authorized by Title V of the Rail Act, 45 U.S.C. §771-780, prior to its repeal by the N.E. Rail Service Act of 1981, 45 U.S.C. §1101 et seq., and currently by Title VII of the Rail Act, 45 U.S.C. §7979, as amended.

Conrail filed a Motion for Summary Judgment on September 10, 1981, on the ground that LeStrange lacked standing to raise a claim for violation of Section 504. On October 20, 1981, Judge Rambo granted Conrail's Motion for Summary Judgment, holding that LeStrange could not demonstrate standing to sue under Section 504 because (1) Conrail did not receive federal funding with a primary objective of providing employment; (2) LeStrange was not an intended beneficiary of the Federal financial assistance to Conrail; and (3) any alleged discrimination in the failure to employ LeStrange did not cause discrimination against the primary beneficiaries of federal aid.

LeStrange appealed Judge Rambo's decision to the United States Court of Appeals for the Third Circuit. In an Opinion by the Honorable Alan Bloch of the United States District Court for the Western District of Pennsylvania sitting by designation, to which the Honorable Arlin M. Adams and the Honorable Joseph F. Weis filed separate concurring Opinions, the court reversed Judge Rambo's decision and remanded the case for further consideration and disposition on the merits. The court concluded that Section 504 prohibited employment discrimination on the basis of handicap by federal grantees, regardless of the nature, purpose and intended beneficiaries of the Federal financial assistance, and that such a prohibition could be enforced by means of a private cause of action.

REASONS FOR GRANTING THE WRIT

A. Introduction.

This case involves issues of substantial public importance over which the Court of Appeals for the Third Circuit is in direct conflict with the Courts of Appeals for the Second, Fourth, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits: whether all federal grantees may be subject to employment discrimination actions under Section 504 of the Rehabilitation Act without regard to the nature, purpose, beneficiaries or scope of the Federal financial assistance. If the decision in the Court of Appeals below is permitted to stand, Conrail respectfully submits that an entirely new class of litigants will be created, despite the express intent of Congress to the contrary.

In finding that Section 504 permitted private employment discrimination claims against all federal grantees, the Court of Appeals below misapplied the holding of this Court in *North Haven Board of Education v. Bell*, ____ U.S. ____, 72 L.Ed.2d 299 (1982), and misconstrued the express statutory language and legislative history of the Rehabilitation Act of 1973, the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq*. Despite Congress' incorporation of all the "remedies, procedures and rights" of Title VI into Section 504 by the 1978 Amendments, the Court of Appeals below incorporated the general enforcement provisions of Title VI into Section 504, but deleted the critical limitation upon those provisions, thereby greatly expanding the scope of the Act beyond that contemplated by Congress.

In addition, the Opinion of the Court of Appeals below failed to limit the remedy provided by Section 504 to beneficiaries of the Federal financial assistance. By neglecting to require a nexus between the allegedly discrim-

inatory failure to hire LeStrange and a specific Conrail program supported by federal funding, the Court of Appeals below also ignored the clear mandate of the Rehabilitation Act and of this Court, in *North Haven Board of Education v. Bell, supra*.

Alternatively, while this issue was not directly addressed below, the Court recently questioned whether an implied private cause of action exists under Title VI. *Guardians Association v. Civil Service Commission of the City of New York*, No. 81-431 (U.S., argued Nov. 1, 1982). In light of this Court's comments, Conrail requests that the parties be permitted to brief and argue whether an implied cause of action exists under Section 504.

Accordingly, this Court should review the decision of the Third Circuit and, upon review, reverse that decision.

B. The Third Circuit's Decision That the Purpose of Federal Assistance Is Irrelevant in Determining tl. Applicability of Section 504 of the Rehabilitation Act Conflicts With Decisions of the Courts of Appeals for the Second, Fourth, Eighth and Ninth Circuits.

In *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), the Court of Appeals for the Fourth Circuit held that an employment discrimination action under Section 504 may not be maintained unless a primary objective of the Federal financial assistance is to provide employment. *Id.* at 89. The court based this decision upon the following analysis: While Section 504 generally prohibits "discrimination under any program or activity receiving Federal financial assistance," the Rehabilitation Act of 1973 contains no specific enforcement provision for Section 504. Congress therefore provided, in Section 505 of the 1978 amendments to the Rehabilitation Act, 29 U.S.C. §794a, that "the remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964

shall be available to any person aggrieved. . . ." under Section 504. In addition to Section 601 of Title VI, 42 U.S.C. §2000d ("Section 601"), which prohibits discrimination on the ground of race, color or national origin in language similar to that of Section 504, Title VI contains, in Section 604, a limitation upon the rights provided therein:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. §2000d-3 ("Section 604"). Accordingly, the "remedies, procedures and rights" of Title VI included a specific substantive limitation upon employment discrimination actions. Because all of the "remedies, procedures and rights" of Title VI had been incorporated into Section 504 by the 1978 Amendments, the *Trageser* court held that the restriction upon actions under Title VI contained in Section 604 must also be applied to actions brought under Section 504. As a result, an action under Section 504 could not be brought unless a primary objective of the Federal financial assistance was to provide employment.

The above-described analysis has been adopted by three other Courts of Appeals. The United States Court of Appeals for the Eighth Circuit in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980), in adopting the *Trageser* interpretation of Section 504, noted that while the limitation contained in Section 604 of Title VI literally applied to only agency enforcement, the legislative history of Title VI conclusively demonstrated that Congress intended the following general limitation: Title VI protection extended only to the intended beneficiaries of Federal financial assistance.

Thus, in order to prevail in an employment discrimination action under Section 504, the Plaintiff must show that the purpose of the federal aid was to provide employment.[4]

The United States Court of Appeals for the Second Circuit, in *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981) referred to the decision of the Fourth Circuit in *Trageser* and the decision of the Eighth Circuit in *Carmi* in finding that no employment discrimination cause of action on account of handicap under Section 504 existed unless the primary purpose of federal funding was to provide employment. The analysis of the courts described above was also expressly adopted by the United States Court of Appeals for the Ninth Circuit in *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982).[5]

In the instant case, the Court of Appeals below erroneously rejected the *Trageser-Carmi-Cabrini Medical Center-Scanlon* analysis. The court founded its decision, in part, upon the holding of this Court in *North Haven Board of Education v. Bell, supra*, which the Third Circuit stated ". . . dictates our approach in this case." 687 F.2d at 769. In *North Haven*, the Court found that the employment practices of educational institutions may be challenged under Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 ("Section 901"), regardless of the nature or purpose of the Federal

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4. The Eighth Circuit has reaffirmed its holding in *Carmi* in two subsequent cases, *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982); *Simon v. St. Louis County, Missouri*, 656 F.2d 316 (8th Cir. 1981).

5. Shortly prior to the decision of the Third Circuit in the instant case, the United States Court of Appeals for the Eleventh Circuit, in *Jones v. Metropolitan Atlanta Rapid Transit Authority*, No. 81-7746 (11th Cir. Aug. 6, 1982) held that Section 604 did not apply to actions under the Rehabilitation Act, and therefore a plaintiff need not demonstrate that a primary purpose of the Federal funding was to provide employment.

financial assistance.[6] Because the wording of Section 504 of the Rehabilitation Act is similar to Section 901 of the Education Amendments, the Court of Appeals below adopted a presumption that the same result was required in the instant case. Moreover, Judge Adams, in his concurring opinion, concluded that the analysis of *North Haven* ". . . appear[ed] to compel . . ." a finding that the employment practices of all federal grantees may be challenged under Section 504, regardless of the nature or purpose of the Federal financial assistance. 687 F.2d at 777.

Contrary to the Court of Appeals' decision, the Court's opinion in *North Haven* cannot fairly be applied outside the context of Title IX. Indeed, *North Haven* explicitly distinguished between Title IX and Title VI on the basis of the limitation contained in Section 604:

> If Congress had intended that Title IX have the same reach as Title VI, therefore, we assume that it would have enacted counterparts to both §601 and §604. For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them.

72 L.Ed. 2d at 313-14. As noted above, the Rehabilitation Act, as amended, has incorporated the "remedies, procedures and rights" of Title VI into Section 504. This Court's implicit recognition of a limitation upon the scope of Title VI in *North Haven* therefore would apply equally to actions brought under Section 504. Accordingly, the Court of Appeals' reliance upon this Court's decision in *North Haven* is misplaced.

The erroneous application of *North Haven* to the instant case by the Court of Appeals below is highly sig-

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6. Section 901 provides that:

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

nificant, for *North Haven* was used as the basis for effectively overruling a settled line of cases established by four other Courts of Appeals. Thus, *North Haven* has served as an unintended catalyst for a finding that the purposes of Federal financial assistance are irrelevant to the applicability of Section 504, notwithstanding this Court's express limitation of its holding in *North Haven* to Title IX, and the contrary findings of the Courts of Appeals in *Trageser*, *Carmi*, *Cabrini Medical Center* and *Scanlon*.

This unwarranted extension of *North Haven* will have a dramatic effect upon the volume of federal Rehabilitation Act litigation. The prior settled law, as found by four Courts of Appeals, had expressly limited the employment discrimination implied cause of action to those handicapped individuals alleging discrimination in federally funded programs established to provide employment. Under the reasoning of the Court of Appeals below, however, every handicapped employee or applicant for employment may maintain an action against the employer simply by showing the receipt of Federal financial assistance, for any purpose. Such a result is not consistent with the holding of this Court in *North Haven*, and is contrary to both the intent of Congress, as expressed in the specific provisions of the Rehabilitation Act, as amended, and the decisions of the four Courts of Appeals discussed above. In addition, it is likely to increase the amount of litigation relating to private employers who receive any Federal financial assistance.

After reviewing the decision of this Court in *North Haven*, the Court of Appeals below examined the statutory provisions at issue and concluded, contrary to four other Courts of Appeals that have decided the precise issue, that Section 505(a)(2) of the 1978 amendments to the Rehabilitation Act did not incorporate Section 604 of Title VI into Section 504 of the Rehabilitation Act. 687 F.2d at 770. The court based its conclusion upon the language of Section 604, which is limited to depart-

ments or agencies, rather than to persons. Indeed, the court stated that "the question of whether Section 604 also limited the rights of private litigants was unlikely to even occur to the Congress." 687 F.2d at 771.[7] This interpretation of the statutes is clearly erroneous.

Neither Title VI nor Section 504 expressly provide for private actions to redress perceived discrimination. Compliance with Title VI was to be effected by the termination of federal funding pursuant to Section 602, 42 U.S.C. §2000d-1, while Section 504 contained no enforcement provisions. Therefore, the lack of any reference to "persons" in Section 604 is simply due to the lack of any express cause of action for "persons", as acknowledged by the Court of Appeals below. Assuming, *arguendo*, that a private right of action may be implied under Title VI and Section 504, the same limitation applicable to agencies logically would also apply to individuals who bring suit under these provisions. Conversely, it is not logical to assume that Congress intended the same non-discrimination provision to create a panoply of implied individual rights *beyond* those which may be effectuated by agency action. It is similarly illogical to assume that Congress, in incorporating the "remedies, procedures and rights" of Title VI into Section 504, in-

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7. Under this reasoning, the Court of Appeals below would clearly find that the restriction contained in Section 604 would not apply to private litigants under Title VI, as well as Section 504. The Department of Health and Human Services has not adopted this extreme position, for the applicable regulations generally require that the employment practices of a federal grantee may only be challenged under Title VI where a primary objective of the Federal financial assistance is to provide employment. 45 C.F.R. 80.3(c).

The only exception to this rule prohibits employment discrimination which would result in discriminatory treatment of beneficiaries of any program supported by federal funding. 45 C.F.R. 80.3(c)(3). The District Court in the instant case expressly found that this exception could not apply herein, for discrimination against LeStrange did not cause any discrimination against the beneficiaries of the Federal financial assistance. Slip op. at 23-24.

tended to delete the significant limitation upon those rights and remedies established by Section 604 either with respect to agency action or private causes of action. This Court has stated that ". . . where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet." *Arnett v. Kennedy*, 416 U.S. 134, 153-4 (1974). Had Congress intended to delete Section 604 from the application of Title VI to Section 504, it expressly could have done so in Section 505(a)(2) of the 1978 Amendments.[8]

Based upon the reasons set forth above, the Court should grant the instant Petition for a Writ of Certiorari in order to resolve the direct conflict among the Courts of Appeals on an issue of substantial public importance. The Court of Appeals below has held, in direct conflict with four other Courts of Appeals, that the purpose of Federal financial assistance is irrelevant to the applicability of Section 504. In so holding, the Court of Appeals below erroneously relied upon *North Haven*, in which this Court construed a materially different statute from that at issue here. If allowed to stand, the decision of the Court of Appeals will permit a plethora of private employment discrimination actions against all federal grantees, without restriction as to the nature of the fed-

8. Similarly, the Court of Appeals below rejected Conrail's argument that Congress' extension of the rights, remedies and procedures of Title VI to Section 504, while extending the rights, remedies and procedures of Title VII, 42 U.S.C. §2000e *et seq*, to Section 501 of the Rehabilitation Act, 29 U.S.C. §791, which requires affirmative action plans by federal agencies, demonstrated that employment discrimination actions would be severely limited under Section 504. Despite the Third Circuit's finding that the procedures of Title VII could not have been applied to all actions under Section 504 because the EEOC lacked expertise in non-employment related areas, presumably Congress could have extended the Title VII procedures to employment discrimination actions under Section 504, if it had so intended.

eral funding. This would produce the anomalous result of providing private litigants with greater enforcement rights than the federal agencies, who are charged with the responsibility of enforcing both Title VI and Section 504. This result could not have been intended by Congress nor by this Court and therefore, the Court should grant the Petition for a Writ of Certiorari upon this question.

C. The Third Circuit's Decision, Which Failed To Require a Nexus Between a Specific Program Supported by Federal Financial Assistance and the Denial of Employment to LeStrange, Is in Direct Conflict With the Decision of This Court in *North Haven*, As Well As the Decisions of Other Courts of Appeals.

Assuming, *arguendo*, that LeStrange may bring an action under Section 504 without demonstrating that the primary purpose of the Federal financial assistance to Conrail is to provide employment, the Court of Appeals nonetheless erred in failing to require any connection between LeStrange's claim of discrimination and a specific program of Conrail supported by Federal financial assistance. The decision of the Court of Appeals permitted the instant action to go forward based solely upon the LeStrange's claim that he was denied a position because of his handicap and that Conrail received Federal financial assistance. Conrail respectfully submits that the Court of Appeals' failure to consider whether LeStrange was discriminated against as a participant or beneficiary of a specific program supported by federal funding is in derogation of the "program-specific" mandate of Section 504, and therefore is in conflict with the holding of this Court in *North Haven Board of Education v. Bell, supra*, as well as the decisions of the Courts of Appeals for the Fifth, Seventh and Eleventh Circuits.

Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap ". . . under any pro-

gram or activity receiving Federal financial assistance." As shown above, the quoted language is identical to that utilized in Section 901 of Title IX regarding sex discrimination in educational institutions, and Section 601 of Title VI regarding discrimination on the basis of race, color or national origin by federal grantees. Although this Court in *North Haven* upheld the HEW regulations prohibiting employment discrimination on the basis of sex, the case was remanded because ". . . the Court of Appeals paid insufficient attention to the 'program specific' nature of the statute." 72 L. Ed.2d at 317. This decision was based largely upon the language of Section 902 of Title IX, 20 U.S.C. §1682, which limits the agency's power to terminate funds to ". . . the particular program or part thereof, in which . . . noncompliance has been found," and authorizes the agency to implement regulations only ". . . with respect to such program or activity . . ." This Court specifically stated:

> Certainly, it makes little sense to interpret the statute, as respondents urge, to authorize an agency to promulgate rules that it cannot enforce. And §901(a) itself has a similar program-specific focus: it forbids gender discrimination 'under any education program or activity receiving Federal financial assistance . . . .'

72 L. Ed.2d at 318.

Anomalously, the Court of Appeals below ignored this Court's express admonition as to the "program-specific" nature of Title IX in its analysis of Title VI and Section 504. By its very language, Section 504, like Section 901(a), has a program-specific focus. In addition, as noted above, the "remedies, procedures and rights" of Title VI have been incorporated into Section 504 by the 1978 amendments to the Rehabilitation Act. Section 602 of Title VI, 42 U.S.C. §2000d-1, is virtually identical to Section 902 of Title IX, for it also limits the agency's power to terminate funds to ". . . the particular

program, or part thereof, in which such noncompliance has been found," and it also authorizes the agency to implement regulations only ". . . with respect to such program or activity." Thus, the "program-specific" nature of Title IX is mirrored by the "program-specific" nature of Title VI, which must also be applied, by reason of the 1978 amendments, to Section 504. The Court of Appeals below failed to consider this requirement and therefore its decision, under the dictates of *North Haven*, should be reviewed.[9]

Furthermore, the decision of the Court of Appeals is in direct conflict with the decisions of other Courts of Appeals that have required such a nexus in the context of a complaint brought under Section 504.

Based upon the language of Section 504, the United States Court of Appeals for the Seventh Circuit has found that:

> The statute does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. Instead, its terms apparently require that the discrimination

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9. Although inconsistent with the decision of this Court in *North Haven*, the decision of the Court of Appeals below is consistent with the prior Third Circuit decision of *Grove City College v. Bell*, 687 F.2d 684 (3d Cir.), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Nov. 9, 1982) (No. 82-792). In that case, the court held that an entire educational institution may be considered a "single program" and subject to regulation under Title IX, if it receives any federal aid, and that aid is not specifically earmarked for a particular educational function within the institution. By adopting such a broad definition of "program", the Third Circuit has effectively eviscerated the requirement that enforcement activity under Title IX be "program-specific." Due to the similarity between Section 901 of Title IX and Section 504, the Court of Appeals below implicitly found it could also ignore the "program-specific" provisions of Section 504, based upon *Grove City*. Indeed, the concurring opinion by Judge Adams expressly recognized that *Grove City*, in conjunction with *North Haven*, were ". . . consonant with, and perhaps even compelled . . ." the decision of the Third Circuit in the instant case. 687 F.2d at 777.

> must have some direct or indirect effect on the handicapped persons in the program or activity receiving federal financial assistance. To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he would otherwise receive from the program.

Simpson v. Reynolds Metals Company, Inc., 629 F.2d 1226, 1232 (7th Cir. 1980). This conclusion is bolstered by the legislative history of Title VI which, as shown above, must be read *in pari materia* with Section 504, especially in light of Section 505(a)(2) of the 1978 amendments to the Rehabilitation Act. As noted by the Seventh Circuit, this legislative history demonstrates that Congress only intended to extend Title VI protection to the participants and beneficiaries of the Federal financial assistance.[10] The court also referred to several excerpts in the legislative history of Section 504 which supported the program-specific nature of the Rehabilitation Act.[11] Because the plaintiff in *Simpson* could not demonstrate any nexus between his discharge by reason of his handicap and the federally assisted program, the court affirmed the dismissal of his Section 504 claim.

The identical analysis has been utilized by the United States Court of Appeals for the Fifth Circuit in *Brown v. Sibley*, 650 F.2d 760 (5th Cir. 1981). After re-

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10. For example, during the legislative discussion over Title VI, Representative Celler stated:

> As to each assisted program or activity, Title VI will require an identification of those persons whom Congress recorded as participants and beneficiaries and in respect to whom the principle declared in Title VI would apply.

110 Cong. Rec. 1521 (1964).

11. For example, the Senate Report on Section 504 notes:

> The Committee Bill . . . prohibits discrimination against qualified handicapped individuals *under Federal grants*. S. Rep. No. 318, 93d Cong., 1st Sess. 18, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2091 (emphasis supplied).

viewing the relevant statutory provisions and legislative history, the Fifth Circuit there announced that:

> . . . [I]t is not sufficient, for purposes of bringing a discrimination claim under section 504, simply to show that some aspect of the relevant overall entity or enterprise receives or has received some form of input from the federal fisc. A private plaintiff in a section 504 case must show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance.

650 F.2d at 769 (footnotes omitted). This holding has been reaffirmed by the new Court of Appeals for the Eleventh Circuit in *Doyle v. University of Alabama*, No. 81-7697 (11th Cir. July 19, 1982).[12]

The failure of the Court of Appeals below to require that LeStrange demonstrate that he suffered discrimination in the context of a specific federally funded program also stands in sharp contrast to the recent decision of the United States District Court for the Eastern District of Virginia in *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982). In that case, the court held that the mere receipt of Federal financial assistance by a university did not constitute a sufficient basis for an agency investigation under Title IX into allegations of discriminatory treatment within its athletic program, which received no direct funding. The Civil Rights Division of the Justice Department recently announced that it would not appeal this decision, for it found the decision

12. In an analogous case, the United States Court of Appeals for the First Circuit has held that an individual who could not identify a specific federally funded program under which she suffered discrimination because of her sex could not maintain a Title IX cause of action merely by showing the receipt of federal funds by a law school. *Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981). This decision, like *Simpson* and *Brown*, cannot be reconciled with *Grove City*, upon which the decision of the court below rests.

". . . to be both analytically and legally sound . . ." The Washington Post, October 11, 1982, at A17.[13] Thus, the decisions of the Third Circuit in the instant case and in *Grove City* directly conflict with a decision of this Court, the decisions of other Courts of Appeals, and the position of the agency charged with the primary statutory responsibility of enforcing Title IX, Title VI and Section 504. Indeed, the employer in *Grove City* has filed a Petition for a Writ of Certiorari with the Court. The petition raises issues under Title IX that are analogous to those raised herein. The Petition for a Writ of Certiorari on this question should therefore be granted.

D. The Third Circuit's Decision Erroneously Assumed, Without Discussion, That a Private Right of Action May Be Implied Under Section 504 of the Rehabilitation Act.

Petitioner did not argue below that no private cause of action may be implied under Section 504, because the law in the Third Circuit and other circuits on this question appeared to be well settled.[14] Moreover, while this Court specifically declined to decide the question of

13. The initial announcement by the Justice Department of the decision not to appeal *University of Richmond* was reported in The Washington Post on September 9, 1982, at A23. The period for filing a timely appeal of the court's decision, which was filed on July 8, 1982, expired on September 7, 1982, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The docket of the District Court for the Eastern District of Virginia reflects that the case has not been appealed.

14. The Third Circuit has expressly found that a private cause of action may be implied under both Title VI and Section 504 in *National Association for the Advancement of Colored People v. The Medical Center Inc.*, 599 F.2d 1247 (3d Cir. 1979). This decision was in accord with the earlier holdings of the Seventh Circuit in *Lloyd v. Regional Transport Authority*, 548 F.2d 1277 (7th Cir. 1977) (implied cause of action under both Title VI and Section 504) and the Fifth Circuit in *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967) (implied cause of action under Title VI).

whether a private right of action existed under Section 504 in *Southeastern Community College v. Davis*, 442 U.S. 397, 404-5 n.5 (1979), the decision of this Court in *Cannon v. University of Chicago* 441 U.S. 677 (1979), in which a private right of action was implied under Title IX in large part because of a Congressional understanding that such a right existed under Title VI, appeared to foreclose the issue.

In a recent oral argument before this Court, however, in *Guardians Association v. Civil Service Commission of the City of New York, supra*, several Justices expressed concern over the necessity of deciding whether a private cause of action exists under Title VI. That case involved the propriety of federal regulations under Title VI which permitted the termination of funds based upon the effects of discriminatory practices, rather than upon their intent. While the issue was not raised nor argued below, Mr. Justice Powell questioned counsel for the petitioner whether the lawsuit could proceed unless a private cause of action was found to exist. In answer to counsel's statement that ". . . I don't think that there would be [a lawsuit] if there were no private cause of action," Mr. Justice Powell stated, "which would suggest that we do have to decide that issue. I don't know . . . ." Mr. Justice White then remarked that ". . . certainly we wouldn't be precluded from deciding it. . . ." (Transcript of Oral Argument, November 1, 1982, at 36).

The concern expressed by this Court during the oral argument discussed above demonstrates that the existence of an implied cause of action under Title VI is still in doubt. Although this Court's decision in *Cannon* has been interpreted to demonstrate the viability of such a cause of action, *N.A.A.C.P. v. The Medical Center, Inc.*, 599 F.2d at 1257, that decision only found that Congress, in framing Title IX in 1972, believed a private right of action existed under Title VI, rather than finding that a private Title VI right did in fact exist. *Cannon v. University of Chicago*, 441 U.S. at 703. Similarly, the

plurality opinion of this Court in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) merely assumed, for purposes of that case, that a private cause of action under Title VI existed. *Id.* at 283-84. Justice White, however, filed a separate opinion, in which he specifically dissented from that assumption on the basis that Congress did not intend to create such a right in 1964. *Id.* at 380-87.

This Court may exercise its discretion to consider issues not raised in the courts below where the determination of such an issue constitutes "plain error" in an "exceptional case". *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947); SUPREME COURT PRACTICE, STERN & GRESSMAN §6.27, 458-461 (5th Ed. 1978). The question of the existence of an implied right of action under Title VI and, by reason of the 1978 Amendments, under Section 504, is fundamental to the instant case as well as to a broad range of cases currently being litigated under these statutes. Accordingly, should the Court decide that this issue remains open and must be decided, Conrail respectfully requests that the parties be permitted to bring the issue before the Court. If permitted to do so, Conrail would demonstrate that Congress did not intend to create a private right of action under Title VI and that, consequently, no such right exists under Section 504. On this basis, this Court should grant the instant petition and upon review, reverse the decision of the Third Circuit below.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2943

THOMAS LE STRANGE,
Appellant

v.

CONSOLIDATED RAIL CORPORATION,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. No. 78-0944)

Submitted June 8, 1982

Before: ADAMS and WEIS, *Circuit Judges*
and BLOCH*, *District Judge*

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* The Honorable Alan Bloch, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

BLOCH, *District Judge*.

Plaintiff brought suit, pursuant to §504 of the Rehabilitation Act of 1973, claiming he was denied employment by the defendant because he is handicapped. Section 504, 29 U.S.C. §794, provides: "No otherwise qualified handicapped individual . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." Although the lower court dismissed plaintiff's action because he lacked standing to bring his suit, we think the question posed by this appeal is, in fact, whether §504's prohibition against discrimination by federal grantees encompasses a ban against employment discrimination.

I

The lower court concluded plaintiff did not have standing to sue defendant for employment discrimination "unless 1) providing employment is a primary objective of the federal aid received by the defendant, or 2) discrimination in employment necessarily causes discrimination against primary beneficiaries of the federal aid." *LeStrange v. Consolidated Rail Corp.*, No. 78-0944 (M.D. Pa. Oct. 20, 1981). The court further refined the first prong of its standing test to require the plaintiff to show he is a primary beneficiary of the federal aid received by the defendant, and that the primary objective of the federal aid be to create new jobs, and not merely to maintain employment or to compensate for lost jobs. Plaintiff could not meet either of the two prongs of the lower court's standing test.

This standing test had its genesis in the case of *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d

87 (4th Cir. 1978). The *Trageser* analysis has since been adopted by the Eighth Circuit in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (1980), the Second Circuit in *United States v. Cabrini Medical Center*, 639 F.2d 908 (1981), and the Ninth Circuit in *Scanlon v. Atascadero State Hospital*, No. 80-5201 (May 24, 1982). *Trageser* and its progeny rely on §505(a)(2) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, amending the Rehabilitation Act of 1973, which provides:

> "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such. . . ."

29 U.S.C. §794a(a)(2).

Title VI served as the model for §504 of the Rehabilitation Act. Section 601 of Title VI provides:

> "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. §2000d.

Section 602 of Title VI authorizes federal departments and agencies to promulgate regulations to enforce §601's prohibition against discrimination, including regulations providing for the termination of federal funding in the event of non-compliance. *id.*, §2000d-1. However, §604 provides:

> "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment."

Id., §2000d-3.

Trageser concludes, first, that §604 limits not only agency action, but also the actions of private litigants. It then concludes that the remedies, procedures and rights of Title VI extended to the victims of handicap discrimination by the 1978 amendments to the Rehabilitation Act includes §604's limitation on the right to bring an action for employment discrimination.

The lower court reformulated the *Trageser* holding into a test for standing, peculiar to §504 actions. We see no reason to formulate any test for standing for §504 actions other than that promulgated by the Supreme Court for general application, that is (a) does the plaintiff allege "that the challenged action has caused him injury in fact, economic or otherwise"; and (b) "[is] the interest sought to be protected by the complainant . . . arguably within the zone of interests [sought] to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 152-53 (1970). The relevant question on this appeal would then be whether plaintiff's interest in being free from employment discrimination falls within the zone of interests sought to be protected by §504. However, the correct formulation of the test for standing for §504 actions is not the crucial issue presented by this appeal. For however the test is formulated, the crucial issue is whether §504, as amended in 1978, covers employment discrimination against the handicapped by federal grantees.

II

The Supreme Court recently confronted this same issue within the context of Title IX of the Education Amendments of 1972, and we believe its approach in *North Haven Board of Education v. Bell*, 50 U.S.L.W. 4501 (May 17, 1982), dictates our approach in this case.

Section 901(a) of Title IX, like §504 of the Rehabili-

tation Act, is modeled after §601 of Title VI of the Civil Rights Act. It provides:

> "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

The Department of Education promulgated regulations pursuant to Title IX, prohibiting federally funded education programs from discriminating in employment on the basis of gender. Two Connecticut public school boards brought separate suits challenging its authority to issue the regulations, arguing Title IX was not meant to reach the employment practices of educational institutions.

The Supreme Court began its analysis by focusing on the statutory language, concluding first that "[A] female employee who works in a federally funded education program is 'subjected to discrimination under' that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues." *id.* at 4503, and, therefore, that, "Because §901(a) neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary," *id.* To determine whether "other considerations counsel to the contrary," the Supreme Court looked to the legislative history "for evidence as to whether Congress meant somehow to limit the expansive language of §901," *id.* The Court found no such evidence and held, "Title IX proscribes employment discrimination in federally funded education programs," *id.* at 4507.

III

The statutory language of §504 of the Rehabilitation Act and §901 of Title IX being virtually identical, we are bound to conclude, like the Supreme Court in *North Haven*, that because §504 "neither expressly nor impliedly excludes employees from its reach, we should interpret the provisions as covering and protecting these 'persons' unless other considerations counsel to the contrary." For like female employees, handicapped employees are "subjected to discrimination under" a federally funded program if they are paid lower salaries, given less opportunity for promotion, or forced to work under more adverse conditions than are their non-handicapped colleagues. Similarly, a handicapped individual is certainly "subjected to discrimination under" a federally funded program if, as alleged in our case, he is not hired at all, solely because of his handicap.

Of course, *Trageser* and the courts which have followed it, including the lower court in this case, find counsel to the contrary in §505(a)(2) of the 1978 amendments to the Rehabilitation Act, extending the remedies, procedures and rights of Title VI to victims of handicap discrimination. Title IX contains no provision similar to §505(a)(2). *Trageser* would also argue that §505(a)(2) should be read together with §505(a)(1), 29 U.S.C. §794a(a)(1), extending the remedies, procedures and rights of Title VII to victims of handicap discrimination by the federal government. The failure of Congress to extend Title VII to victims of discrimination by federal grantees indicates to the *Trageser* court its intention to limit the scope of §504 to discrimination other than employment discrimination. We do not believe that the statutory language of §505(a)(2), even when read in the context of §505(a)(1), indicates a desire to narrow the scope of §504. For this reason, we would nonetheless find §504 prohibits employment discrimination by federal grantees unless anything in the legislative history of either §504 or §505(a)(2) counsels to the contrary.

Section 505(a)(2) extends the remedies, rights and procedures of Title VI to (1) persons; (2) aggrieved by any act or failure to act by either a recipient or a provider of federal funds. Title VI consists of six provisions,[1] and the only one which extends to *persons* any rights or remedies is §603, 42 U.S.C. §2000d-2, providing for judicial review of agency action.

The plain words of §604 limit its application to departments or agencies. Given the statutory scheme of which Title VI is a part, it is not illogical to assume Congress intended precisely what it said and no more. Title VI is, of course, a part of the 1964 Civil Rights Act. The 1964 Civil Rights Act also has a Title VII which deals exclusively with employment discrimination. In 1964, it prohibited employment discrimination on the basis of race, color or national origin by *any* employer with 15 or more employees working each working day for at least 20 weeks. Obviously, the sweep of Title VII is far broader than Title VI. Clearly, Title VI was never meant to be a prime tool for the enforcement of employment rights.

Title VII created a new federal agency, the Equal Employment Opportunity Commission, to battle employment discrimination. Without the limiting language

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1. The first provision of Title VI, §601, 42 U.S.C. §2000-d, is the declaration prohibiting discrimination on the basis of race, color or national origin by federal grantees. The second provision, §602, *id.* §2000d-1, authorizes federal departments and agencies to issue rules, regulations and orders to effectuate the initial prohibition against discrimination. Section 602 also provides that compliance with the regulations may be effected by the termination of federal funding. It further provides for a number of procedures clearly designed, not to protect the victim of discrimination, but the federal grantee. Section 603, *id.* §2000d-2, provides for judicial review of agency action. Section 604, id. 2000d-3, prohibits any department or agency from terminating funds for employment discrimination unless a primary goal of the federal program involved is to provide employment. Section 605, *id.* §2000d-4, exempts from the scope of Title VI programs which receive federal financial assistance by way of a contract of insurance or guaranty.

of §604, Title VI threatened to engage every other department and agency in the same battle, with the potential danger of varying rules, regulations and strategies.

The question of whether §604 also limited the rights of private litigants was unlikely to even occur to the Congress. The only reason for a private litigant to sue for employment discrimination under Title VI is that he failed to meet the administrative requirements to bringing suit under Title VII. Even then, an action brought pursuant to 42 U.S.C. §1983 may provide a wider range of remedies than a Title VI action.[2]

As to the implications raised by §505(a)(1), extending the remedies, procedures and rights of Title VII to victims of discrimination by the federal government, closer analysis undermines the *Trageser* argument that this too indicates Congressional intent to limit §504 to discrimination other than employment discrimination.

Section 505(a)(1) extends particular provisions of Title VII to individuals aggrieved by the final disposition of a complaint brought pursuant to §501 of the Rehabilitation Act. Section 501 requires federal departments, agencies and instrumentalities, including the Postal Service, to develop an affirmative action plan for the hiring, placement and advancement of handicapped individuals. Handicapped employees or prospective employees aggrieved by agency action or inaction may file a complaint with the agency. The particular provisions of Title VII referred to in §505(a)(1) extend to complaining individuals the right to appeal an adverse agency decision to the EEOC and then to bring a civil action in court. The various provisions prescribe various time limitations on agency action and the filing of appeals and civil suits. They further proscribe various court procedures.

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2. Some courts have decided that a Title VI litigant is entitled to declaratory and injunctive relief only, and not monetary damages. *Drayden v. Needville Independent School Dist.*, 642 F.2d 129 (5th Cir. 1981); *Concerned Tenants Ass'n. v. Indian Trails Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980).

Section 505(a)(1) refers alleged victims of employment discrimination on the basis of handicap in the federal government to the very sections of Title VII dealing with employment discrimination on the basis of race, color, religion, sex or national origin in the federal government. Section 505(a)(1) asks the EEOC to do what it is already doing for victims of employment discrimination on one basis for victims of employment discrimination on another basis. The question before the EEOC in either case is the same: was this person discriminated against in the making of some employment decision? Once the EEOC has made its determination, the alleged discriminatee, if dissatisfied, may go to court.

In contrast, extending Title VII rights, remedies and procedures to victims of discrimination by federal grantees would present a host of new issues to the EEOC. First, it would take it beyond the realm of employment discrimination for the first time, to discrimination in housing, access, education, etc. Second, it would ask it to resolve the issue of what is a federally-funded program or activity, a question with which it has no familiarity.

The failure of Congress to extend Title VII to victims of §504 discrimination was obviously intended simply to short-circuit the EEOC, and for obvious reasons. Reading into the statutory framework of §505 an intention to drastically narrow the scope of §504 is a strained interpretation of an otherwise reasonably constructed provision. Support should be found in the legislative history before we should stretch so far.

IV

In order to be certain that Congress intended what the broad sweep of its language in §504 indicates, we must undertake a two-step analysis of legislative history. Section 504 should be read to prohibit employment discrimination "unless other considerations counsel to the

contrary." Considerations counselling to the contrary may be found in the legislative history of §504 of the Rehabilitation Act of 1973 or the legislative history of the 1978 amendments, which introduced §505(a)(2) to the Act. We begin with the 1973 legislative history. Because we believe nothing in that history indicates Congress intended anything less than it said, we then turn to the history of the 1978 amendments to determine if Congress, at that point, intended to narrow the scope of its prior enactment.

A

The legislation which would eventually become the Rehabilitation Act of 1973 was considered and passed by the Congress three times before it was finally signed into law by President Nixon on September 26, 1973. Sen. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted* in 1973 U.S. Code Cong. & Ad. News 2076, 2086-2090 [hereinafter cited at Sen. Rep. No. 93-318]. A provision prohibiting discrimination against the handicapped by federal grantees was part of all three measures, *id.* at 2078-2082, although it was not part of the original resolution passed in 1972 by the House. Comm. of Conf. Rep. H.R. 8395, 92d Cong., 2d Sess., *reprinted in* 118 Cong. Rec. 35141, 35163.

All versions of the legislation were lengthy, the first two even lengthier than the third. Certainly, the primary purpose of the legislation was to extend the 53-year-old vocational rehabilitation program, for another period of years, with a new mandate, in the original two bills, to give priority to the severely handicapped. In addition, the bills as originally submitted to the President authorized a program which, for the first time, would have provided rehabilitation services to severely handicapped individuals with no feasible vocational goals. In addition, the original two bills would have created a series of other new programs concentrating on particular sub-groups of

the handicapped, such as older deaf and blind individuals with spinal cord injuries and individuals with end-stage renal disease. Finally, the bills would have mandated certain research and created a number of federal bodies to deal with particular problems of the handicapped. Sen. Rep. No. 93-318, 1973 U.S. Code Cong. & Ad. News at 2078-2079.

The first bill was pocket vetoed by the President on October 27, 1972. 118 Cong. Rec. 37203. The second bill was vetoed on March 27, 1973, 119 Cong. Rec. 9307, and the Senate failed to override the veto a week later, *id.* at 10794. Serious negotiations between the Administration and, primarily, the Senate then began. Sen. Rep. No. 93-318, 1973 U.S. Code & Ad. News at 2082.

The President's primary objection to the original two bills was that they authorized what he considered to be an excessive and inflationary amount of money to fund the proposed programs. He also objected to what he saw as a change of focus in the highly successful vocational rehabilitation program by requiring priority be given to the severely handicapped. He also opposed the proliferation of categorical grants to fund the new programs and the proliferation of federal commissions, councils and divisions. 118 Cong. Rec. 5880 (first veto memorandum); 119 Cong. Rec. 24570 (second veto memorandum). The final bill that was to become law was trimmed from seven titles to five. It required only that vocational rehabilitation programs give equal, not priority, treatment to the severely handicapped, eliminated all the proposed new programs, including the non-vocational rehabilitation program, eliminated most of the new federal bodies which would have dealt with the problems of the handicapped, and, of course, significantly lowered the amount of money authorized to fund the remaining legislation. Sen. Rep. No. 93-318, 1973 U.S. Code Cong. & Ad. News at 2079-2082.

At no time was there any dispute between the Administration and the Congress over the wisdom of the

non-discrimination provision which would eventually be codified in §504. Neither was it ever a matter of controversy between the Senate and the House. Although it was not part of the first House resolution, the Senate version was accepted in conference with no more than the notation, "The House recedes." 118 Cong. Rec. 35163.

It is not surprising, therefore, that despite the pages of legislative history generated by an act debated and passed three times by Congress, that there is little reference to §504. There is no direct reference indicating that §504 was not meant to cover employment discrimination. However, there are several both direct and indirect references indicating the contrary.

The Rehabilitation Act was born in the Senate in the newly constituted Subcommittee on the Handicapped of the Committee on Labor and Public Welfare. The subcommittee was charged with examining *all* issues related to the handicapped, not just those raised by the vocational rehabilitation program. 119 Cong. Rec. 5882. The expanded focus of the bill which was reported by the subcommittee was certainly due, in part, to the wide focus of the subcommittee's mandate. The legislative history indicates one of the problems of the handicapped addressed by the subcommittee was the problem of employment discrimination.

Senator Cranston, who chaired the subcommittee for the purpose of considering the legislation extending the vocational rehabilitation program, commented during debate on various criticisms of the program which he felt could not be handled simply by amending the Vocational Rehabilitation Act itself. "Such problems as *unfounded discrimination in employment* and in housing, difficulties of access to places of work and treatment centers, and duplication and fragmentation of services

across program lines were voiced repeatedly to the committee," he noted. (Emphasis added). *Id.*[3]

Discrimination in employment has a particularly detrimental impact on the vocational rehabilitation program. Senator Cranston noted:

> "[D]iscrimination in placement, hiring and advancement continue to limit the vocational rehabilitation program's ability to effect successful rehabilitations . . . The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to eliminate architectural barriers and provide substantial accomplishments in employment for handicapped individuals."

Id.

These sentiments of Senator Cranston expressed during debate on the second incarnation of the act were echoed by Senator Taft during debate on the third incarnation of the act:

> The basic purpose of vocational rehabilitation continues to be to help physically and mentally handicapped individuals achieve the ability to work, earn, and live independently in their communities. Yet in spite of the relatively high success of this program, we still have a long way to go . . . Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed — utilized in capacities well below the levels of their training, education, and ability.
>
> However, if we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program,

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3. *See also*, the remarks of Senator Stafford, the ranking minority member of the subcommittee, 119 Cong. Rec. 5893; and Sen. Rep. No. 93-318, 93d Cong. 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2078.

> we must devote more of our energy toward the elimination of the most disgraceful barrier of all — discrimination.

Id. at 24587.

And, clearly, the Rehabilitation Act addressed the problem of employment discrimination. As described by Senator Javits, co-sponsor of the act, a member of the subcommittee and ranking minority member of the parent Committee on Labor and Public Welfare, "This measure draws upon the experience of the past half century and provides new emphasis on the severely handicapped, the homebound, client services and participation, *opportunities for employment of the handicapped* and administration improvements." (Emphasis added). *Id.* at 5887. The bill as originally reported and ultimately enacted into law provided, in sections immediately preceding §504, for affirmative action programs to encourage the hiring of the handicapped by the federal government, 29 U.S.C. §791(b) and federal contractors, 29 U.S.C. §793. It is hard to imagine, in an Act whose primary goal is to enhance the vocational capabilities of the handicapped, that if the legislature had intended to limit the reach of a provision which immediately follows two sections whose express purpose is to encourage the hiring of the handicapped, that someone somewhere in the legislative history would not have said so. On the contrary, several members indicated the opposite.

During debate on the original bill, Senator Javits highlighted several new areas of federal responsibility recognized by the legislation: "I refer, for example, to . . . provisions for encouraging hiring of the handicapped under Federal contracts and Federal grants." 118 Cong. Rec. 32305. Senator Humphrey reviewed those provisions requiring affirmative action by federal contractors and prohibiting discrimination by federal grantees and found they embodied the intent of bills he had introduced earlier which would have amended both Titles VI and VII of the 1964 Civil Rights Act to include the

handicapped. *Id.* at 32310. Finally, Senator Williams, chairman of the full Committee on Labor and Public Welfare, during debate on the third version of the bill, reviewed provisions retained from the first two versions, including, "prohibitions against discrimination in employment in programs assisted with Federal funds." 119 Cong. Rec. 24588.

These few direct references to §504 support the conclusion that the intent of Congress matched the broad sweep of its language. We turn now to the question of whether Congress intended to narrow the scope of §504 by the 1978 amendments, specifically §505(a)(2).

B

Section 505(a)(2) originated in the Senate and was adopted by the Committee of Conference assigned to reconcile the Senate and House versions of the 1978 amendments to the Rehabilitation Act. House Conf. Rep. No. 95-1780, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7375, 7404. Although the Joint Explanatory Statement of the Committee of Conference offers no assistance in interpreting the provision, noting only that the House receded in its opposition to §505(a)(2), *id.*, the report of the Senate Committee on Human Resources accompanying the original Senate bill discusses the purpose of the provision.

The Senate Committee notes that the then Department of Health, Education and Welfare had recently issued regulations enforcing the prohibition against handicap discrimination by federal grantees embodied in §504. These regulations are particularly noteworthy because HEW was assigned the task, by executive order, of coordinating the issuance of regulations enforcing §504 by all federal departments and agencies. These regulations, subsequently codified at 45 C.F.R. §84.1 *et seq.*, prohibited discrimination in employment practices, *id.* at §84.11. Nonetheless, the Committee stated:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. *Thus, this amendment codifies existing practice as a specific statutory requirement.*

Sen. Rep. No. 95-890, 95th Cong. 2d Sess., p. 19. (Emphasis added).

The committee further stated that applying the provisions of Title VI to §504 of the Rehabilitation Act would assure "administrative due process, and provide for administrative consistency within the Federal Government." *Id.*

The committee report contains nothing that would indicate it felt HEW exceeded its statutory authority by prohibiting employment discrimination in its recently promulgated regulations. Similarly, no one during the debate in the Senate or House suggested HEW had gone too far. In fact, the only Congressman who directly mentioned the regulations during debate, Representative Dodd, "strongly supported the long-delayed issuance of the section 504 regulations believing then, as now, that the protections they establish for the handicapped are very much needed." 124 Cong. Rec. 13905.

Several proposed amendments to the act, and the debate on them, further indicate that Congress understood §504 to reach employment discrimination, when enacted and as amended. For example, Senator Cannon proposed during debate an amendment which, for the purpose of §503 and §504 of the Rehabilitation Act, would exclude from the definition of handicapped individual an alcoholic or drug abuser "whose condition of alcoholism or drug abuse renders that individual not qualified for employment . . ." The purpose of Senator Cannon's amendment, which was eventually passed and codified at 29 U.S.C. §707(7)(A), was: "To exclude alco-

holics and drug abusers from certain employment provisions of the Rehabilitation Act . . ." 124 Cong. Rec. 30322. Its scope was considerably narrower than a similar measure proposed in the House which would have excluded alcoholics and drug abusers from the definition of handicapped individuals altogether, regardless of whether their condition impacted on their employability or not.

Clearly, Senator Cannon believed §504 reached employment discrimination, and nobody during the debate on his argument suggested otherwise. More specifically, nobody suggested that if §504 had at one time reached employment discrimination, the proposed §505(a)(2) would have the effect of eliminating it from its scope. Senator Williams, chairman of the Committee on Human Resources, spoke in support of Senator Cannon's amendment, which he felt necessary "because of misunderstandings and distortions concerning employment rights of alcoholics and drug dependent persons." *Id.* at 30323. Senator Williams felt the amendment "would reassure employers that it is not the intent of Congress to require any employer to hire a person who is not qualified for the position or who cannot perform competently in his or her job." *Id.*

Senator Hathaway also spoke in support of the amendment because he felt it would protect those many alcoholics and drug addicts who hold jobs and perform them satisfactorily. "Sections 503 and 504 of the Rehabilitation Act protect such persons employed by agencies which receive Federal funds or employers which have Federal contracts from being fired solely because of their alcoholism or drug addiction." *Id.* at 30324.

Another amendment proposed during debate would have amended §505(a)(1) to limit a court in an action brought against the federal government to equitable and affirmative action remedies proportionate to actual dam-

ages.[4] 124 Cong. Rec. 30576. Its sponsor, Senator McClure, described the amendment's function as insuring "that mammoth affirmative action remedies involving substantial construction could not be compelled in instances in which actual damages were comparatively small." *Id.*

Senator McClure's amendment was vehemently opposed by Senator Cranston, a sponsor of the 1978 act, on the basis that the federal government should be required to do no less than private employers. Senator Cranston argued:

> The amendment offered by the Senator from Idaho would create an unwise and unrealistic distinction with respect to employment between the obligations of the Federal Government and the obligations of Federal contractors and grantees. Ironically, the Senator's amendment would limit — with a financial test — the Federal Government's obligation of being an equal opportunity employer. Federal contractors and grantees would — appropriately — continue to be required to be equal opportunity employers.

Id. at 30577-30578.

Finally, we would note the remarks of Representative Jefford, a member of the Subcommittee on Select Education, which reported the House version of the act, commenting on the creation of the Architectural and Transportation Barriers Compliance Board in §118 of the amendments:

> [W]e gave this board new and expanded responsibilities *for this one aspect of 504*. It is our

4. A compromise was reached later in debate, which resulted in the following language being inserted in §505(a)(1): "In fashioning an equitable or affirmative action remedy . . . a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy." 29 U.S.C. §794a(a)(1).

> thought that by separating only the "physical" barriers . . . from actual discrimination in *jobs*, education, housing, and health, we have taken a significant step forward.

Id. at 13901. (Emphasis added).

None of the above-quoted references to employment discrimination brought forth any objections from the speakers' colleagues in the House and Senate. Indeed, they did not bring forth so much as a question or request for clarification.

Combining the legislative history looking for the intent of Congress is often a frustrating chore. Often the intent of Congress hinges on the remarks of one or two individuals. *See North Haven*, *supra* at 4504. Here our task has not been so difficult. Clearly, the legislative history to the 1978 amendments demonstrates a widespread understanding on the part of Congress that §504, even as amended, proscribed employment discrimination against the handicapped.

C

Post-enactment pronouncements provide confirmation of Congressional intent to cover employment discrimination in §504. The Senate Committee on Labor and Human Resources, whose predecessors reported both the 1973 Rehabilitation Act and its 1978 amendments, stated unequivocally one year after *Trageser*, *supra*:

> [*Trageser*] is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of, [section 504] regardless of the designated use of the Federal funds received by the employer in question.

In 1980, responsibility for coordinating enforcement of §504 by federal departments and agencies was transferred to the Attorney General. In his analysis of rules promulgated pursuant to this authority, the Attorney General took note of HEW's earlier regulations prohibiting employment discrimination, *Trageser* and *Carmi*, the legislative history of both the 1973 Act and the 1978 amendments, and concluded, "[T]he Department believes that the employment practices of recipients of Federal financial assistance are covered by section 504 regardless of the purpose of the assistance . . ." Nondiscrimination Based on Handicap in Federally Assisted Programs — Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed. Reg. 37620, 37628 (1980).

V

Under the holding of the district court, Conrail is prohibited from discriminating against handicapped passengers, but is free to discriminate against the handicapped in employment. Such an analysis of §504, unless supported by the words of the relevant statutes or their legislative history, is absurd.

Thus far, the handicapped have not been extended the broad protections against discrimination extended women and members of other minority groups. Federal law protects the handicapped only if employed by the federal government, or federal contractors or grantees. To eliminate protection against discrimination in employment by federal grantees would eliminate a substantial portion of the small amount of protection afforded the handicapped. What is a commonsensicle approach to Title VI, thus, becomes a devastating blow within the context of the Rehabilitation Act. "In the context of §504 of the Rehabilitation Act, applied *Trageser*-style, §604 operates as a blunderbuss." *Scanlon*, *supra* at 2163 (Ferguson, J., dissenting). *See also*, *Carmi*, *supra* at 679

(McMillian, J., concurring). Neither the words of the statutes, nor legislative histories, dictate such a result.

For this reason, the order of the district court is reversed, and the case remanded for further consideration and ultimate disposition on the merits.

ADAMS, *Circuit Judge*, concurring in the judgment.

Had this appeal been presented for resolution several months ago, I might well have joined the other four courts of appeals in concluding that the Act was not intended to cover discrimination against the handicapped by private employers. After all, the statute makes no direct reference to private employment, and it certainly is not unreasonable to read the restrictions contained in section 604 of Title VI into the Rehabilitation Act.

Nonetheless, I have concluded that the result reached by the Court in this case is consonant with, and perhaps even compelled by, two recent decisions, one by the Supreme Court, *North Haven Board of Education v. Bell*, 50 U.S.L.W. 4501 (U.S. May 17, 1982), and the second by this Court, *Grove City College v. Bell*, No. 80-2383, slip op., (3d Cir. Aug. 12, 1982). And whatever I might think of the wisdom of these two decisions, I am bound to apply them unless they are overruled.

In *North Haven*,[1] *supra*, the Supreme Court concluded that the Department of Education had statutory authority to regulate employment discrimination in education — even though Title IX of the Education Act makes no direct reference to employment, and even though Title IX, which was patterned after Title VI, might be thought to incorporate the employment-regulation restrictions of section 604 of Title VI. Never-

1. *North Haven* involved claims of gender discrimination committed by two public school districts in Connecticut. The Supreme Court noted that one of those districts, North Haven, "devoted between 46.8% and 66.9% of its federal assistance to the salaries of its employees." 50 U.S.L.W. at 4502.

theless, the Justices reasoned that the broad-sweeping language of Title IX, which did not explicitly rule out the regulation of employment discrimination, when coupled with a strong legislative and postenactment history, constituted a sufficient basis from which to infer a congressional intent to bring employees within the protection of Title IX. The *North Haven* analysis, when applied to the words of the Rehabilitation Act — which for all relevant purposes are identical to the words of Title IX — and when considered in connection within the strong legislative history of section 504, would appear to compel a similar conclusion. The theory and analysis underlying *North Haven*, then, would suggest that LeStrange prevail on this appeal.

In addition to *North Haven*, I am persuaded that it would be difficult to arrive at a contrary result in this matter after the recent opinion in *Grove City*, *supra*. In *Grove City*, also decided under Title IX of the Education Act, a panel of this Court concluded that an entire educational institution is brought within the definition of "program," and therefore subject to regulation under Title IX, if it receives any federal aid, and that aid is general or indirect and not specifically earmarked for a particular educational function within the institution. The logic of *Grove City* would appear to be irreconcilable with the analysis employed in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), where an employer was deemed to fall within the purview of the Rehabilitation Act only if federal funds were received specifically for employment purposes.

For these reasons I join the judgment of the Court in returning this matter to the district court for further proceedings.

WEIS, *Circuit Judge*, concurring.

I join in the judgment of the court because I believe the case on which the district court relied, *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), was erroneously decided. I agree that the issue in this case is not one of standing, as that term is ordinarily used, *see, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 50 U.S.L.W. 4103, 4105-06 (Jan. 12, 1982), but is the more direct question of the scope of §504.

Trageser held that the prohibition against handicap discrimination in §504 of the Rehabilitation Act is limited by the reference in §505(a)(2) to the provisions of Title VI of the Civil Rights Act of 1964. That is, a claim of employment discrimination against the handicapped is subject to §604 of Title VI: "Nothing contained in this subchapter shall be construed to authorize action . . . by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. §2000d-3.

Although it recognized that "§604 expressly curtails the authority of federal departments and agencies," the *Trageser* court concluded that "it also restricts private suits." 590 F.2d at 89. The court cited no authority for its conclusion and I am persuaded that it erred in applying §604 to private suits. The language of §604 confines its application to "action . . . by any department or agency" and does not refer at any point to suits brought by a private individual or entity.

The Rehabilitation Act's reference to Title VI was not intended to restrict the remedies of handicapped individuals but rather to limit the sanctions which government agencies could take against an offending recipient of federal financial assistance. Congress enacted §604 because it feared that when an employment violation occurred, an overzealous federal agency might threaten

the very existence of important programs by invoking the remedy of withholding funds.[1] The reference to Title VI in §505(a)(2) of the Rehabilitation Act must therefore be interpreted with the understanding that §604 was drafted to prevent administrative overkill. Viewed in this light, it is clear that the incorporation of §604 narrows not the rights of victims, but only the coercive measures which a "department or agency" can apply against an offender.

The dissenting opinion of Judge Ferguson in *Scanlon v. Atascadero State Hospital*, No. 80-5201 (9th Cir. May 24, 1982), analyzes the errors of the *Trageser* opinion at length. I agree with Judge Ferguson and see no need to repeat here the reasoning which underlies the conclusions we both reach. *See also, Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 676 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980), McMillian, J. (conc.).

It is worth noting that in *NAACP v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979), this court concluded that there is a private right of action under §504. Our holding today is wholly consistent with that case.

Of course, I intimate no views on the merits of this case and concur in the remand to the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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1. During congressional debates, Title VI was commonly referred to as the "cut-off-the-funds title." *See* Comment, *Employment Discrimination Against the Handicapped: Can Trageser Repeal the Private Right of Action*, 54 N.Y.U.L. Rev. 1173, 1186 n.69.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE, *Plaintiff*	)	
v.	)	Civil Action
CONSOLIDATED RAIL CORPORATION, *Defendant*	)	No. 78-0944

OPINION

Plaintiff, who was employed by Erie Lackawanna Railroad as a locomotive engineer prior to the amputation of his left hand and a portion of his left forearm in 1971, brings this action against defendant, successor in interest to the Erie Lackawanna Railroad, requesting injunctive relief, compensatory damages, punitive damages and attorney's fees.

Plaintiff alleges that shortly after the amputation of his left hand and a portion of his left forearm, he was refused employment by Erie Lackawanna Railroad without a hearing or medical examination. In 1973 defendant became the successor in interest to Erie Lackawanna Railroad pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-779 (hereafter Rail Act) receiving federal financial assistance in the form of "loans" and by way of reimbursement for money paid out by defendant pursuant to the employee protective benefits authorized by Title V of the Act. Plaintiff alleges that from 1973 to April 4, 1978, defendant refused plaintiff employment without the benefit of a medical evaluation or a hearing. Plaintiff was examined by a physician chosen by defendant on April 4, 1978. Defendant classified plaintiff as not qualified for employment as a locomotive engineer on May 2, 1978. Plaintiff was afforded the opportunity to participate in a field test given by defendant on February 15, 1979. Defendant con-

cluded that plaintiff failed the field test and plaintiff charged that the test was unfair. As a result, a second field test was scheduled but was not conducted as plaintiff refused to cooperate, alleging the second test was also unfairly designed to disqualify him as a yard engineer.

In his complaint plaintiff alleges that defendant violated the equal protection clause of the Fourteenth Amendment, the Civil Rights Act, 42 U.S.C. §1983, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (hereafter §504 of the Rehabilitation Act). By order dated November 4, 1980, this court granted defendant's motion to dismiss plaintiff's claims based upon the equal protection clause and the Civil Rights Act, but denied the motion to dismiss as to the claim under §504 of the Rehabilitation Act of 1973. (See *LeStrange v. Consolidated Rail Corporation* (hereafter *LeStrange v. Con. Rail I*), 501 F. Supp. 964, M.D. Pa. 1980).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant has moved for summary judgment in its favor on the issue of plaintiff's standing to bring a private action under §504 of the Rehabilitation Act. In support of its motion, defendant argues that plaintiff cannot maintain a private cause of action under §504 unless he proves that the defendant receives federal financial assistance, the primary purpose of which is to provide employment *and* that plaintiff is a primary beneficiary of the federal funding. Defendant cites as authority for this test *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978) *cert. denied*, 422 U.S. 947 (1979); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980) *cert. denied*, 449 U.S. 892 (1980); *Simpson v. Reynolds Metals Co., Inc.*, 629 F.2d 1226 (7th Cir. 1980); and this court's earlier decision in this case, reported at 501 F. Supp. 964. Defendant also cites recent district court decisions interpreting *Trageser*, *Carmi* and *Simpson* which have reached the same result. These include *Miller v. Abilene Chris-*

tian University, 26 FEP Cases 346 (N.D. Tex. 1981) and *Hall v. Board of County Commissioners*, 509 F. Supp. 841 (D. Md. 1981).

Plaintiff reads *Trageser*, *Carmi* and this court's earlier decision as requiring him to prove that the defendant received federal financial assistance which had a primary objective of providing employment *or* that plaintiff was a primary beneficiary of federal assistance.

In *LeStrange v. Con. Rail I*, *supra* at 968, this court held that the right to bring a private cause of action under §504 of the Rehabilitation Act was governed by the procedures set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq*. The court reached this decision based upn §120(a) of the Comprehensive Rehabilitation Services Amendments of 1978, 29 U.S.C. §794a(a)(2). Section 794a(a)(2) states:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d *et seq.*) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under §504 of this Act (29 U.S.C. §794).

Looking to Title VI of the Civil Rights Act, two provisions are relevant in resolving the standing issue under §504 of the Rehabilitation Act. 42 U.S.C. §2000d states:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d-3 states that:

> Nothing contained in this title (42 U.S.C. §§2000d - 2000d-4) shall be construed to authorize action under this title (42 U.S.C. §§2000d - 2000d-4) by any department or agency with respect to any employment practice of any employer, employment

agency, or labor organization, except where a primary objective of the Federal financial assistance is to provide employment.

Trageser interpreted the limitations of §2000d-3 as applicable to federal departments and private plaintiffs. 590 F.2d at 89. According to *Trageser*, a judicial remedy for employment discrimination by institutions receiving federal funds does not exist unless 1) providing employment is a primary objective of the federal aid received by the defendant, *or* 2) discrimination in employment necessarily causes discrimination against primary beneficiaries of the federal aid. 590 F.2d at 89. (Emphasis added). This court agrees with the *Trageser* interpretation of §2000d-3. In further support of this reading of §2000d and §2000d-3, this court in *LeStrange v. Con. Rail I* quoted Department of Transportation (DOT) regulations implementing §2000d and §2000d-3 as they apply to recipients of DOT funding. Those regulations, 49 C.F.R. §21.5(c)(1), (3) (1980) provide:

> (c) Employment practices:
>
> (1) Where a primary objective of a program of Federal financial assistance to which this part applies is to provide employment, a recipient or other party subject to this part shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay or other forms of compensation or benefits, selection for training or apprenticeship, use of facilities, and treatment of employees). Such recipient shall take affirmative action to insure that applicants are employed, and employees are treated during employment, without regard to their race, color, or national origin. The requirements applicable to

construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive Order which supersedes it.

(3) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the grounds of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions of paragraph (c)(1) of this section shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

The DOT regulations implementing §2000d and §2000d-3 are relevant in this case in two respects. Defendant is a recipient of DOT funding[1] and thus is subject to the regulations. Additionally, no regulations have been promulgated to reflect the changes made by the 1978 amendments to the Rehabilitation Act.[2] As previously noted, the 1978 amendments made the rights and remedies under the Rehabilitation Act coextensive with the rights and remedies available under 42 U.S.C.

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1. Conrail receives federal funds in the form of securities purchased by the United States Railway Association under §216 of the Rail Act, and, prior to September 1, 1981, by way of reimbursement for money paid out by defendant to meet the employee protective benefits mandated by Title V of the Act.

2. Executive Order No. 12250, 45 Fed. Reg. 72995 (1980) directs the United States Attorney General to coordinate the implementation and enforcement of the 1978 amendments to the Rehabilitation Act. No final regulations to implement the 1978 changes have been issued.

§2000d *et seq.* It thus is relevant to examine existing regulations implementing §2000d *et seq.* for purposes of resolving the standing issue in this case.

The *Trageser* court listed the tests of standing for Title VI of the Civil Rights Act of 1964 in the alternative. Although language later in *Trageser* suggests that under both tests a plaintiff must show that the defendant received federal funds whose primary objective was to provide employment[3], this court reads *Trageser* as holding that only the first test requires such a showing. *Trageser* cited *Caulfield v. Board of Education*, 583 F.2d 605 (2d Cir. 1978) and *U.S. v. Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) (*aff'd en banc*), 380 F.2d 385 (5th Cir.) (per curiam), *cert. denied sub nom Caddo Parish School Board v. United States*, 389 U.S. 840 (1967) in support of its second test. These cases indicate that the second test does not require a showing of federal funding whose primary purpose is to provide employment. The Second Circuit in *Caulfield* drew a distinction between 42 U.S.C. §2000d and §2000d-3 based upon HEW implementing regulations. The regulations cited by *Caulfield* are almost identical to the DOT regulations quoted by this court to govern defendant Conrail's receipt of federal funds. Based upon the HEW regulations, the Second Circuit held that the Office of Civil Rights could investigate racial and ethnic discrimination in employment practices in a New York City school system based upon §2000d because the impact of the employment practices affected minority school children who were denied the benefit of teachers with more experience and advanced degrees. There was no show-

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3. Shortly after listing the standing tests in the alternative, the *Trageser* court then made the following somewhat contradictory statement:

> A private action under §504 [of the Rehabilitation Act] to redress employment discrimination therefore may not be maintained unless a primary objective of the federal financial assistance is to provide employment. 590 F.2d at 89.

ing that the primary goal of federal financial assistance received by the school system was to provide employment. The court also rejected the argument that §2000d-3 prohibited the investigation. 583 F.2d at 611. The Second Circuit has not been overruled on this holding.[4]

Trageser also cited *U.S. v. Jefferson County Board of Education, supra* as support for the second test. In *Jefferson* the Fifth Circuit also dealt with 42 U.S.C. §2000d and 42 U.S.C. §2000d-3. The Court explained the legislative history behind the two provisions and drew a distinction between them. The Court read 2000d as "a clear congressional statement that racial discrimination against the beneficiaries of federal assistance is unlawful." 372 F.2d at 882. The Court then explained that after §601 of the Civil Rights Act (42 U.S.C. §2000d) was proposed, "additional clarifying language was suggested to make it clear that discrimination in certain employer-employee relationships, not affecting the intended beneficiaries of the program, would be excluded from the reach of the statute." *Id.* at 883. (Citations omitted). Section 604 of the Civil Rights Act (42

4. The Second Circuit reached a different result in *United States v. Cabrini Medical Center*, 639 F.2d 908 (2nd Cir. 1981). The Second Circuit was again required to interpret the limitations of §2000d and §2000d-3 but this time in the context of the Rehabilitation Act. The Court held that the Department of Health and Human Services' Office for Civil Rights (OCR) was not authorized to investigate a complaint by a hospital employee that he had been discharged in violation of the Rehabilitation Act. The Court found that the defendant hospital received Medicare and Medicaid payments but that such federal financial assistance did not have a primary objective of providing employment and thus under the limitations of §2000d-3 the OCR lacked authority to investigate the complaint. The Court drew no distinction between §2000d and §2000d-3 as it had done in *Caulfield*. No explanation was given by the Court as to why its reading of these two provisions appeared to be narrower than its earlier interpretation in *Caulfield*. This court finds *Caulfield* more persuasive as to the proper interpretation of the two provisions.

U.S.C. §2000d-3) was then added to achieve this purpose. The Court then upheld HEW guidelines requiring desegregation of facilities and school personnel of public schools receiving federal financial assistance. The Court found the agency guidelines fell within the ambit of §2000d because school children were the primary beneficiaries of federal assistance to schools and to the extent that teacher discrimination jeopardized the success of desegregation, it was unlawful wholly aside from its effect upon individual teachers. 372 F.2d at 883. The Court specifically rejected the defendant school board's argument that §2000d-3 prevented HEW's interference with the employment practices of schools. The Court stated that §2000d-3 was never intended as a limitation on desegregation of schools and that the defendant's argument would frustrate the desegregation purposes of the statute.

This analysis shows that the Fifth Circuit did not read §2000d-3 as preventing action against employment discrimination which caused discrimination to beneficiaries of federal financial assistance, even when the primary purpose of the federal assistance was not to provide employment.

Courts since *Jefferson* have read §2000d-3 in the same manner. *See United States v. El Camino Community College District*, 454 F. Supp. 825, 831 (C.D. Cal. 1978), *cert. denied*, 444 U.S. 1013 (1980); *United States v. Frazer*, 297 F. Supp. 319, 322 (M.D. Ala. 1968).

This court agrees with *Caulfield* and *Jefferson* that a plaintiff has standing under 42 U.S.C. §2000d-3 to bring suit for employment discrimination against an employer receiving federal financial assistance if the plaintiff shows that discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid. Under this test the plaintiff does not need to show that a primary objective of the federal assistance is to provide employment. There is nothing in the conference report on §505(a)(2) of the Comprehen-

sive Rehabilitation Services Amendments of 1978 (which made the remedies of Title VI of the Civil Rights Act of 1964 applicable to persons aggrieved by acts of recipients of federal assistance) indicating congressional disagreement with the interpretation given by *Caulfield* and *Jefferson* to 42 U.S.C. §§2000d and 2000d-3. Thus, there appears no reason to ignore this interpretation of the provisions as applied to cases brought under the Rehabilitation Act of 1973. This analysis thus applies to a plaintiff bringing suit under §504 of the Rehabilitation Act of 1973 as amended, since the remedies available under the Rehabilitation Act are coextensive with those available under Title VI of the Civil Rights Act.

In summary, this court holds that a private plaintiff has standing to bring suit under §504 of the Rehabilitation Act of 1973 if he shows *either* that the defendant receives federal financial assistance whose primary purpose is to provide employment or that discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid. No showing of a primary employment objective of the federal assistance is needed under the second test.[5]

Defendant argues that the first test has two components, both of which must be met. The components require that: a) defendant receives federal financial assistance, the primary purpose of which is to provide employment; b) plaintiff is a primary beneficiary of the federal funds. In support of this statement, defendant

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5. This interpretation of 42 U.S.C. §2000d and 42 U.S.C. §2000d-3 as applied to the Rehabilitation Act sets this court apart from other courts who have construed *Trageser* as requiring a showing of a primary employment objective before any private suit under §504 may be maintained. Nothing has come to this court's attention in these later cases to persuade it that *Trageser* should be so read. *See Miller v. Abilene Christian University, supra,* at 347-48; *Hall v. Board of County Commissioners, supra* at 849; *Cabrini, supra* at 911; *Carmi v. Metropolitan St. Louis Sewer District, supra* at 674-75.

cites *Trageser*, *supra* at 89; *Carmi*, *supra* at 675; *Simpson v. Reynolds Metals Co.*, *supra* at 1234.

In Carmi, the Eighth Circuit first examined the language of §504 of the Rehabilitation Act which states:

> No otherwise qualified handicapped individual in the United States, as defined in section 7(7) (29 U.S.C. §706(7)) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

The Court then addressed the application of 42 U.S.C. §2000d-3 to the Rehabilitation Act of 1973. The Court examined the legislative history of 2000d-3 and found that Congress did not intend to extend protection under that section to any person other than the intended beneficiary of federal financial assistance. 620 F.2d at 674, n.4. The *Carmi* court applied this reading of §2000d-3 to suits brought under §504 of the Rehabilitation Act and held that while defendant Metropolitan Sewer District received federal financial assistance in the form of construction and engineering grants, plaintiff, a job applicant who was rejected as a fork lift operator by the defendant due to a physical disability, was not an intended beneficiary of the funds and thus lacked standing to bring suit under §504 of the Rehabilitation Act. 620 F.2d at 675.

In *Simpson*, the Seventh Circuit further refined the scope of the Rehabilitation Act. *Simpson* agreed with the *Carmi* analysis of 42 U.S.C. §§2000d and 2000d-3 as applied to suits brought under §504 of the Rehabilitation Act. 629 F.2d at 1235. The *Simpson* court also examined the legislative history of the Rehabilitation Act and concluded that it authorizes recovery only where the discrimination comes in the operation of a program receiving federal financial assistance, or manifests itself in a handicapped individual's exclusion from the program or

a diminution of the benefits he would otherwise receive from the program. 629 F.2d at 1232. The plaintiff in *Simpson* failed to demonstrate any connection between his discharge from employment by the defendant due to chronic alcoholism and operation of a training program run with federal funding by defendant. Simpson was neither eligible to participate in the program, nor was he denied the benefits of the program by his discharge or subjected to discrimination in its operation. Thus the Court found he lacked standing to bring suit under §504 of the Rehabilitation Act. 629 F.2d at 1231.

This court agrees with the holdings of *Carmi* and *Simpson* on this issue and holds that a plaintiff bringing suit under §504 of the Rehabilitation Act must under the first test for standing, demonstrate that the defendant receives federal financial assistance whose primary objective is to provide employment and that defendant's discriminatory action has excluded plaintiff from participation in the program receiving such aid or caused plaintiff to suffer a diminution in benefits he would otherwise have received from the program or subjected plaintiff to discrimination in operation of the program.

Applying the first test of standing, plaintiff argues that Title V of the Rail Act has a primary goal of providing employment. In support of this position, plaintiff cites numerous provisions from Title V of the Act as well as sections from the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. §§803, 836(a), (b)(3). Defendant contends that the primary purpose of Title V of the Rail Act when read in its entirety is not to create new jobs but to minimize loss of employment and compensate employees who lost their jobs as a result of the railroad reorganization undertaken by the Rail Act. Defendant's brief in response to plaintiff's brief filed in opposition to defendant's motion for summary judgment addresses each of the sections cited by plaintiff and negates his suggestion that a primary employment objective exists, as required by §2000d-3. This court agrees

with defendant's analysis of the individual provisions of Title V and will not repeat the arguments advanced by defendant, except to highlight certain important points. (Relevant portions of defendant's brief are attached as an appendix to this opinion.)

The first point to emphasize is that plaintiff implicitly assumes that the language of 42 U.S.C. §2000d-3 extends to programs that compensate for job loss as well as to programs that create new jobs. This assumption is apparent in that almost all of the statutory provisions cited by plaintiff apply only to "protected employees"[6] of Title V of the Rail Act and not to new hires. (See appendix for provisions cited by plaintiff). Plaintiff fails to cite any legislative history to support this reading of §2000d-3. This court has found no indication that §2000d-3 should be so construed either in the legislative history of the provision or in judicial interpretation of it. This court believes that §2000d-3 covers only those programs whose primary goal is to create new jobs. Support for this view of §2000d-3 is found in *Trageser*. The *Tragser* court rejected the notion that receipt of Medicare, Medicaid, Veterans Administration and welfare payments had a primary purpose of employing nurses to care for patients entitled to receive the payments. 590

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6. (3) "protected employee" means any employee of —

(A) an acquiring or selling railroad who is adversely affected by a transaction;

(B) the Corporation who, immediately preceding such employment by the Corporation, was employed by a selling railroad and who is adversely affected by the sale of rail properties to the Corporation pursuant to an offer designated under section 206(c)(2) of this Act [45 U.S.C. §716 (c)(2)];

(C) a railroad in reorganization in the region; and

(D) a railroad who is adversely affected by a supplemental transaction under section 305 of this Act [45 U.S.C. §745] or by a project recommended under section 206(g) of this Act [45 U.S.C. §716 (g)]; who, in any such case, has not reached age 65 on the effective date of this Act [enacted Jan. 2, 1974]; 45 U.S.C. §771(3).

F.2d at 88. The *Trageser* court could have found that a primary employment objective existed since an incidental effect of the funds could have resulted in the hiring of additional nurses to care for recipient patients or at least the retention of nurses already on the payroll. Since the *Trageser* court failed to find that §2000d-3 was satisfied, it stands to reason that the court would reject the argument that the incidental creation of some new jobs or the incidental retention of some present jobs falls within the meaning of §2000d-3. In the instant case, federal funding under Title V of the Rail Act was, according to the conference report on the bill, to "provide *benefits* and *protections* for protected employees . . ." (emphasis added).[7] Although there are some provisions in Title V that incidentally create new jobs (§776 — Contracting Out) and that discuss retention of current employees of railroads in reorganization (772(b) — Employment offers - Mandatory offer), these provisions are an incidental — and not primary goal of Title V and are limited in scope. (See defendant's brief attached for discussion of §§776 and 772(b)). As discussed later in this opinion, the principal focus of Title V was to provide protection to protected employees adversely affected by the rail reorganization. Thus, even though an incidental effect of Title V was the creation of some new jobs and even though retention of current employees is mentioned, no primary goal of providing new jobs is mentioned. Thus, the present case parallels *Trageser* and under *Trageser* §2000d-3 is not satisfied.

Reference to other portions of the Rail Act, its legislative history and subsequent amendments to it leave no doubt that the Act in general and Title V in particular did not have a primary goal of providing employment as envisioned by §2000d-3. The purposes of the Rail Act

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7. House Conference Report No. 93-744, 93rd Cong. 1st Sess. to accompany H.R. 9142, *reprinted in* [1973] U.S. Code Cong. & Ad. News 3242, 3335.

make no mention of job creation.[8] The final system plan, which is the plan of reorganization for the restructure and modernization of railroads in reorganization under the Act, makes no mention of job creation. Although the plan lists as one of its goals, "the minimization of job losses and associated increases in unemployment,"[9] this wording does not indicate that the Rail Act was enacted as a job creation program. The Senate report on S 2767, the Senate version of the Rail Act, made the following statement about the Act's impact, again showing lack of a job creation goal:

> There is also a need to provide for those persons who will *lose* their jobs as a result of this reorganization. These societal costs, whether provided in the form of unemployment, welfare, and other social costs, or in the form of employee protective provisions within the context of the railroad restructuring effort, must ultimately be borne by the society as

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8. The purposes of the Rail Act are listed below —

(b) Purposes. — It is therefore declared to be the purpose of Congress in this Act to provide for —

(1) the identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this Region and of the national rail transportation system;

(2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;

(3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;

(4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;

(5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and

(6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

45 U.S.C. §701 (b).

9. 45 U.S.C. §716(a)(8).

a whole. Providing for these costs as an integral part of the restructuring effort will allow for a rational and orderly process, while at the same time permitting much greater labor flexibility on the part of the management of the new corporation. These provisions will vastly increase the ability of the new corporation to operate a viable railroad system in the Northeast and Midwest regions. (Emphasis added). S. Rep. No. 93-601, 93rd Cong. 1st Sess., *reprinted in* (1973) U.S. Code Cong. & Ad. News 3242, 3254.

Finally, 45 U.S.C. 836[10], added by the Railroad Revitalization and Regulatory Reform Act of 1976 is cited by plaintiff as proof of the primary employment objective

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10. 45 U.S.C. §836 provides:

836. Employee protection. — (a) General — Fair and equitable arrangements shall be provided, in accordance with this section, to protect the interests of any employees not otherwise protected under title V of the Regional Rail Reorganization Act of 1973 (45 U.S.C. 771 *et seq.*) by actions taken pursuant to authorizations or approval obtained under this title. Such arrangements shall be determined by the execution of an agreement between the representatives of the railroads and the representatives of their employees, within 120 days after the date of enactment of this title [enacted Feb. 5, 1976]. In the absence of such an executed agreement, the Secretary of Labor shall prescribe the applicable protective arrangements, within 150 days after the date of enactment of this title [enacted Feb. 5, 1976].

(b) Terms. — The arrangements required by subsection (a) of this section shall apply to each employee who has an employment relationship with a railroad on the date on which such railroad first applies for applicable financial assistance under this title. Such arrangements shall include such provisions as may be necessary for the negotiation and execution of agreements as to the manner in which the protective arrangements shall be applied, including notice requirements. Such agreements shall be executed prior to implementation of work funded from financial assistance under this title. If such an agreement is not reached within 30 days after the date on which an application for such assistance is approved, either party to the dispute may submit the issue for final and binding arbitration. The decision on any such arbitration shall be rendered within 30 days after such submission. Such arbitration decision

of Title V of the Regional Rail Reorganization Act. Plaintiff's argument is not persuasive. The purposes of the RRRR Act make no mention of providing new employment nor does the legislative history of §836.[11]

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shall in no way modify the protection afforded in the protective arrangements established pursuant to this section, shall be final and binding on the parties thereto, and shall become a part of the agreement. Such arrangements shall also include such provisions as may be necessary —

(1) for the preservation of compensation (including subsequent general wage increases, vacation allowances, and monthly compensation guarantees), rights, privileges, and benefits (including fringe benefits such as pensions, hospitalization, and vacations, under the same conditions and so long as such benefits continue to be accorded to other employees of the employing railroad in active service or on furlough, as the case may be) to such employees under existing collective-bargaining agreements or otherwise;

(2) to provide for final and binding arbitration of any dispute which cannot be settled by the parties, with respect to the interpretation, application, or enforcement of the provisions of the protective arrangements;

(3) to provide that an employee who is unable to secure employment by the exercise of his or her seniority rights, as a result of actions taken with financial assistance obtained under this title, shall be offered reassignment and, where necessary, retraining to fill a position comparable to the position held at the time of such adverse effect and for which he is, or by training and retraining can become, physically and mentally qualified, so long as such offer is not in contravention of collective bargaining agreements relating thereto; and

(4) to provide that the protection afforded pursuant to this section shall not be applicable to employees benefited solely as a result of the work which is financed by funds provided pursuant to this title.

(c) Subcontracting. — The arrangements which are required to be negotiated by the parties or prescribed by the Secretary of Labor, pursuant to subsections (a) and (b) of this section, shall include provisions regulating subcontracting by the railroads of work which is financed by funds provided pursuant to this title. (Feb. 5, 1976, P. L. 94-210, Title V, §516, 90 Stat. 82.)

11. See Senate Conference report No. 94-595, 94th Cong., 2nd Sess., *reprinted in* (1976) U.S. Code Cong. & Ad. News 14, 222-26.

In sum, nothing in Title V of the Rail Act supports a finding that the primary purpose of federal funding under that title was to provide new employment. Thus plaintiff fails to meet the first component of test one for standing, as set out by *Trageser* and interpreted by this court.

Plaintiff argues that he meets the second component of test one for standing. He contends that he is a primary beneficiary of federal financial assistance under the Rail Act on the basis that he is a protected employee under Title V of the Act, and that he was covered by a collective bargaining agreement with the Erie Lackawanna Railroad prior to its conveyance to Conrail. Although plaintiff has failed to meet *Trageser's* first test for standing by failing to satisfy its first component, this court will address the second component because of its relevance in resolving standing under *Trageser's* second test.

Under the second component of *Trageser's* first standing test, plaintiff must show that he is a primary or intended beneficiary of federal financial assistance received by Conrail. According to *Simpson*, in order to prove his status as a primary or intended beneficiary, the plaintiff specifically must prove that discrimination under §504 of the Rehabilitation Act came in the operation of Title V of the Rail Act, or manifested itself in plaintiff's exclusion from this program or in diminution of the benefits he would otherwise have received from the program.

Plaintiff contends that he is a primary or intended beneficiary under Title V because he fits one of the definitions of a protected employee listed in 45 U.S.C. §771(3). Under 45 U.S.C. §771(3)(C), a protected employee is "any employee of a railroad in reorganization in the region." Plaintiff contends that he is an employee of a railroad in reorganization, defined "as a person, who on the effective date of a conveyance of rail properties of a railroad in reorganization to the Corporation . . . has an

employment relationship with . . . said railroad in reorganization. . . ."[12] Plaintiff asserts that he had an employment relationship with Erie Lackawanna, in the form of a medical leave of absence, at the time of the conveyance. While it appears that plaintiff meets the definition of a protected employee, this fact standing alone is not persuasive that plaintiff is a primary beneficiary of Title V.

The primary goal of Title V[13] was to provide benefits and protection to employees of railroads *adversely* affected by the reorganization. This fact is made clear from an examination of the statements cited in footnote 13 concerning Title V in general and from a review of the primary employee protective provisions of Title V. Under 45 U.S.C. §775(a), a protected employee whose employment is governed by a collective bargaining agreement is assured of not being placed in a *worse position* with respect to compensation, working conditions and other matters, subject to certain limitations. Under §775(b), a protected employee is provided with a monthly displacement allowance for certain periods in which the employee is *deprived of employment*. Under

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12. 45 U.S.C. §771(2).

13. In addition to statements already cited in this opinion, the following statements are useful in determining the primary goal of Title V:

> The provisions of this bill, while beneficial to the Nation and the consuming public, could have an extremely painful effect on thousands of employees *whose jobs could disappear* in the process of reorganization and restructuring. (Emphasis added). (S. Rep. No. 93-601, 93rd Cong., 1st Sess., *reprinted in* (1973) U.S. Code Cong. & Ad. News 3242, 3246).
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> To say the least, this is rather extraordinary relief for one segment of organized labor, despite the fact that many other groups of workers have also been *adversely affected* in the past by government action. (Emphasis added.) (Additional view of Messrs. Cotton, Griffin, Cook and Beall to S. Rep. No. 93-601, 93rd Cong., 1st Sess., *reprinted in* (1973) U.S. Code Cong. & Ad. News 3242, 3305).

§775(d), a protected employee who has been *deprived of employment* may be transferred to bona fide vacancies in certain situations. Under §775(e), a protected employee who is *tendered and accepts an offer by the* corporation *to resign* and sever his employment relationship is entitled to a separation allowance under specified conditions. Under §775(f), the Corporation *may* terminate an employee of a railroad in reorganization with less than three years' service with such railroad and such employee is entitled to specified benefits. Under §775(g), a protected employee who is *required to make a change of residence* as a result of a transaction is entitled to specified benefits.

Plaintiff has failed to show that he suffered any adverse effect from the conveyance of the Erie Lackawanna to Conrail. Prior to the conveyance plaintiff was on a medical leave of absence and he has maintained that status since the conveyance. He thus was never placed in a worse position with respect to compensation, nor deprived of employment and hence is ineligible for a monthly displacement allowance nor was he required to make a change of residence, nor was he a recipient of a separation allowance or termination allowance. In short, even though plaintiff meets the definition of a protected employee, he still is ineligible for those protections forming the primary core of Title V.

Similarly, even though plaintiff, as an employee of a railroad in reorganization, was entitled to and did receive a mandatory offer of employment from Conrail following the conveyance of the Erie Lackawanna, as required by 45 U.S.C. §772(b), plaintiff still is ineligible for those protections available to a protected employee adversely affected by the reorganization. Significantly, §772(b) states that an employee to whom a mandatory offer of employment is extended is to receive the protective benefits of Title V. Plaintiff is not entitled to the primary protections of the Act. *See Sabol v. Board of Education of*

the Township of Willingboro, County of Burlington, 510 F. Supp. 892 (D.N.J. 1981), for an analogous situation.

Plaintiff also argues that he is an employee covered by a collective bargaining agreement and hence is an intended beneficiary of Title V. Plaintiff contends that he was covered by a labor agreement with the Erie Lackawanna at the time of the latter's conveyance to Conrail.

Again, the mere fact that plaintiff was covered by a collective bargaining agreement does not elevate plaintiff's status to an intended beneficiary of Title V. It is true that Title V speaks about collective bargaining agreements. It directs Conrail to negotiate new collective bargaining agreements with representatives of employees of railroads in reorganization (45 U.S.C. §774(a)) and provides for interim application of existing collective bargaining agreements until new agreements are negotiated (45 U.S.C. §774(a)). It is important to note, however, that §774(a) specifically states that "provisions in other existing job stabilization agreements shall not be applicable to transactions effected pursuant to this Act to which the provisions of section 505 (45 U.S.C. §775 Employee Protection) of this title shall be superseding and controlling." Similarly, §774(d) directs that the new collective bargaining agreement negotiated between Conrail and representatives of employees of railroads in reorganization "shall not include any provisions for job stabilization resulting from any transaction effected pursuant to this Act which may exceed or conflict with those established herein." These two sections indicate the centrality of those provisions of Title V that provide benefits and protections to protected employees adversely affected by the rail reorganization and the importance of their taking precedence over existing or newly negotiated labor agreements. Thus again, the fact that plaintiff is covered by a labor agreement but ineligible for those protections that form the primary core of Title V prevents plaintiff from occupying an intended beneficiary position under Title V.

Since plaintiff has not shown that he is eligible to participate in those provisions of Title V which form its primary protective provisions he occupies the same position as the plaintiff in *Simpson*. And, as in *Simpson*, plaintiff thus is unable to show that he has been denied admittance to the Title V primary protections by defendant's allegedly discriminatory actions. Nor can he show that defendant's allegedly discriminatory action denied him any of the primary benefits under Title V. Finally, he has not been subjected to discrimination under Title V since there is no connection between his denial of employment and Title V. Thus, plaintiff is not a primary or intended beneficiary of Title V under *Simpson* and thus fails under the second component of *Trageser's* first test of standing.

Plaintiff also attempts to establish standing under the second test set out in *Trageser*. Plaintiff must show that defendant received federal financial assistance and that employment discrimination against plaintiff, a non-beneficiary of the federal aid, causes discrimination against the primary beneficiaries of the aid. *See Sabol, supra* at 898, citing *Simpson*. As previously discussed in this opinion, plaintiff need not show that the primary purpose of the federal financial assistance is to provide employment in order to satisfy the second test.

Plaintiff contends that since he is an employee covered by a collective bargaining agreement, he might be able to prove that any discrimination against him may have necessarily caused discrimination against other employees covered by the collective bargaining agreement. As the court has previously discussed, the mere fact that an employee of a railroad in reorganization is covered by a collective bargaining agreement is not sufficient to classify that person as an intended beneficiary of Title V. Thus, plaintiff can only meet the second standing test of *Trageser* if he shows that discrimination against him resulted in discrimination against protected employees adversely affected by the reorganization who

are the primary and intended beneficiaries of Title V. Plaintiff has made no such claim. And, even if he were able to make such an allegation, he would still fail under the second test. As the *Sabol* court pointed out, a non-beneficiary plaintiff must allege a pattern or practice of discrimination and not one solitary case of discrimination in order to satisfy the second test. 510 F. Supp. at 899. In support of this statement, *Sabol* cites *United States v. Jefferson County Board of Education*, *supra* and *Caulfield v. Board of Education*, *supra* which involved broad policies of discrimination against non-beneficiaries.

Since plaintiff has failed to meet either test of standing for bringing suit under §504 of the Rehabilitation Act of 1973, there is no genuine issue as to any material fact and defendant is entitled to judgment as a matter of law. Therefore, defendant's motion for summary judgment will be granted.

Sylvia H. Rambo
United States District Judge

Dated:

APPENDIX

A. Providing Employment is Not the Primary Purpose of the Rail Act As a Whole

Although the main focus of plaintiff's argument regarding the purpose of federal funding to Conrail is Title V of the Rail Act, he does cite other portions of the Rail Act. Apparently, plaintiff leafed through the Rail Act to extract any language even remotely connected to an employment issue, losing sight of the fact that it is only the Act's primary purpose which is important. Even the random sections of the Act relied on by plaintiff to prove his point, however, are unconvincing.

First, plaintiff quotes from the goals of the final system plan respecting minimization of job losses and increased unemployment. If anything, that section supports Conrail's argument that the thrust of any employment related sections of the Act is to compensate for *un*employment. Next, plaintiff quotes Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. §803 (the RRRRA), providing for nondiscrimination under that Act. Unfortunately for plaintiff, that section on its face has nothing to do with hiring as he asserts.[1] Furthermore, had plaintiff quoted that section in its entirety, it would have been apparent that the RRRRA has its own enforcement provisions to assure equality of opportunity under programs funded by the RRRRA. In any event, plaintiff shows no connection between himself and any program funded pursuant to RRRRA. Finally, plaintiff relies on yet another section of the RRRRA to show the primary purpose of a different act, the Rail Act. Assuming, *arguendo*, that one section of an act passed three years after the Rail Act would have anything relevant to say about the primary purpose of the Rail Act, the particular section selected by plaintiff for this purpose does not achieve his goal. Plaintiff points

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1. Nor does it prohibit discrimination against the handicapped.

to Section 516 of the RRRRA, 45 U.S.C. §836 entitled "Employee Protection" to prove that the primary goal of the Rail Act is to provide employment. However, part of that section not quoted by plaintiff makes clear that the employee protection provided applies only to persons *already* employed, not new hires:

> The arrangements required by subsection (a) of this section shall apply to each employee *who has an employment relationship with a railroad* on the date on which such railroad first applies for applicable financial assistance under this subchapter. 45 U.S.C. §836(b).

Moreover, this section could not subject Conrail to liability under Section 504 even if plaintiff were successful in showing that the purpose of the financial assistance available under Subchapter II of the RRRRA is to provide employment. First, plaintiff never shows that Conrail received any federal aid under these provisions. Second, as the part of §836 quoted by plaintiff in his brief shows, this section does not apply to employees protected by Title V. Since plaintiff alleges that he is protected by Title V, plaintiff could never be an intended beneficiary of the aid and thus could not meet his burden of proof under Section 504. *See* Part III, *infra*.

B. Plaintiff's Failure to Focus on Title V As A Comprehensive Approach to the Problem of Employee Protection Distorts His View of Title V

The legislative history of Title V, and the interpretation of the Special Court and arbitrators authorized to interpret Title V, all indicate that Title V was an integral part of Congress' legislative plan for revitalizing rail freight carriers in the Northeast and *not* an employment statute. Plaintiff ignores the fact that Title V was conceived of as an integrated package, all the elements of which contributed to the goal of cushioning the adverse consequences of *un*employment and *under*-employment

expected to result from Conrail's efforts to reach self-sufficiency. Instead he focuses upon isolated portions of Title V, never tying those portions into the larger statutory scheme from which the isolated portions derive their real meaning.

First, plaintiff looks to Section 502, 45 U.S.C. §772 which he says provides for offers of employment to protected individuals. However, what Section 502 actually required was a *mandatory* offer of employment by Conrail to current employees of the bankrupt railroads:

> (b) MANDATORY OFFER. — The Corporation *shall offer employment*, to be effective as of the date of a conveyance or discontinuance of service under the provisions of this Act, *to each employee of a railroad in reorganization in the region* who has not already accepted an offer of employment by the [United States Railway] Association (where applicable), an acquiring railroad, or the Corporation. *Such offers of employment to employees represented by labor organizations shall be confined to their same craft or class. Id.* (Emphasis added.)

Thus, this section did not envision the hiring of new employees or creating new employment opportunities. Conrail could not pick the employees it wanted — Congress mandated that every employee currently employed by a railroad that would become part of Conrail would maintain an employment relationship with the newly created Conrail. Conrail did not even have the choice of offering an employee a position in a different class or craft than the one the employee currently held.

As the statute directed, Conrail did offer to establish an employment relationship with all employees of a railroad in reorganization on April 1, 1976.[2] *See* Affidavit

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2. Plaintiff insists that his employment relationship with Conrail extends back to the effective date of the Rail Act in 1974. However, as §502(b) above makes clear, the employment relationship was not to be effective until conveyance date or until the railroad in reorganization discontinued service.

of James Leach. These offers were extended to employees of railroads in reorganization who were not working due to disability or an authorized leave of absence as well as active employees, which explains plaintiff's appearance on Conrail seniority rosters. *See* Affidavit of James Leach. No new jobs were created, however, and many of the employees who became active Conrail employees were put in surplus status because Conrail could not utilize all the employees of seven different railroads. *See* Affidavit of James Leach. Congress' objective was to maintain the status quo on employment to the extent possible. At the same time, it recognized that, as with past railroad mergers, there would be a decrease in employment opportunities when seven railroads were compressed into one. Section 505 of Title V provides the compensation for job loss referred to in the final system plan.

The rest of the sections relied on by plaintiff merely give some direction to Conrail in dealing with the thousands of employees who became Conrail employees on April 1, 1976. Section 504, 45 U.S.C. §774 told Conrail how the collective bargaining agreements of seven railroads were to be consolidated into one agreement for each class or craft on Conrail. *See* 45 U.S.C. §774. Section 506, 45 U.S.C. §796 defines, as its title indicates, the circumstances under which Conrail can contract out work which had been performed by employees subject to a collective bargaining agreement. *See* 45 U.S.C. §776. None of these sections deals with the hiring of employees.[3] Finally, plaintiff makes a brief reference to

3. At the pre-trial conference, plaintiff's counsel suggested that the last sentence of Section 506 enables Conrail to set up apprenticeship, training or recruitment programs and thus provides for employment. However, it is clear that the purpose of this section is to restrict Conrail's right to contract out work subject to a collective bargaining agreement to those instances where Conrail has no employees either active or surplus in the particular craft or class who would normally do the work, to perform the work and cannot train any in that craft or class to do the work.

Section 510 of the Rail Act, 45 U.S.C. §780. Once again, that section does not provide any employment and in fact, does not even apply to Conrail. It merely says that *if other railroads* are hiring employees, those railroads should give first consideration to separated or furloughed Conrail employees *provided that* the former Conrail employee would not interfere with the carrier's affirmative action obligations.

As the discussion above indicates, Title V is a very intricate statute that deals with how to effectuate the consolidation of seven railroads into one. Certainly, what to do with all the railroad employees was a major concern of Congress in the consolidation process. However, Title V, regarded as a whole, was designed primarily to handle the contingency of massive unemployment; it was not an attempt to provide new employment opportunities. Because the Rail Act, including Title V, does not have a primary purpose of providing employment, plaintiff's cause of action must fail.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE, *Plaintiff*	:	
v.	:	Civil Action No. 78-0944
CONSOLIDATED RAIL CORPORATION, *Defendant*	:	

ORDER

IT IS HEREBY ORDERED THAT:

1. Defendant's motion for summary judgment on the issue of plaintiff's standing to bring a private action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, is granted.

A discussion of the relevant law is embodied in the opinion filed herewith.

Sylvia H. Rambo
United States District Judge

Dated:

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE, *Plaintiff*	:	
v.	:	Civil Action No. 78-0944
CONSOLIDATED RAIL CORPORATION, *Defendant*	:	

MEMORANDUM

Plaintiff, who was employed by Erie Lackawanna Railroad as an engineer prior to the amputation of his left hand and a portion of his left forearm in 1971, brings this action against defendant, successor in interest to the Erie Lackawanna Railroad, requesting injunctive relief, compensatory damages, punitive damages and attorney's fees. In his complaint, which was filed on September 22, 1978, plaintiff alleges defendant has violated the equal protection clause of the Fourteenth Amendment, the Civil Rights Act, 42 U.S.C. §1983, and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. On October 26, 1979, plaintiff filed an amended complaint to which defendant filed a motion to dismiss on December 3, 1979, supported by a brief filed December 4, 1979. Plaintiff filed a reply brief on February 8, 1980.

Plaintiff alleges that shortly after the amputation of his left hand and a portion of his left forearm, he was refused employment (by Erie Lackawanna Railroad) without a hearing or medical examination. In 1973 defendant became the successor in interest to Erie Lackawanna Railroad pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-779 (hereafter Rail Act) receiving federal assistance in the form of

"loans." Plaintiff alleges that from 1973 to April 4, 1978, defendant refused plaintiff employment without the benefit of a medical evaluation or a hearing. Plaintiff was examined by a physician on April 4, 1978 and was classified as not qualified for employment as an engineer by defendant on May 2, 1978. Plaintiff was afforded the opportunity to participate in a field test given by defendant on February 15, 1979. Defendant concluded that plaintiff failed the field test and plaintiff charged that the test was unfair. As a result, a second field test was scheduled but was not conducted as plaintiff refused to cooperate, alleging the second field test also was unfairly designed to disqualify him as an engineer.

In its motion, defendant contends plaintiff has failed to state a cause of action under the equal protection clause of the Fourteenth Amendment and 42 U.S.C. §1983 as plaintiff has not alleged the required "state action" for the Fourteenth Amendment claim or "acting under color of state law" for the §1983 claim. Plaintiff contends that defendant does operate under color of state law in that it is an interstate common carrier, uses public railways throughout the state, and has received federal financial assistance. Plaintiff concludes that if defendant uses state property and receives federal financial assistance, "one can hardly say that government action is not involved." (Plaintiff's brief, p. 5).

Plaintiff has apparently failed to make a distinction between "state action" and "government action," whether it be state or federal. Receipt of *federal* financial assistance has no bearing on whether defendant is operating under "color of *state* law." Further, the mere fact that a common carrier uses public property does not show "state action." Were that true, any private trucking company using state highways would be considered acting "under color of state law." The U.S. Supreme Court dealt with the issue of "state action" in regard to a regulated electric utility in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). In *Jackson* the Court stated:

> The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 462 (1952). It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will the acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself. *Moose Lodge No. 107, supra* at 176. The true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met. *Id.* at 350-351. (Footnotes omitted) (citations omitted).

The Court went on to find that there was no relationship between the utility's action and its monopoly status as would establish "state action," that the utility was not performing a "public function" since there was no obligation on the state to furnish utility service, that the state utility commission's approval of the utility's general tariff did not constitute state action, and that the state was not a joint participant in the utility's enterprise. In conclusion, the Court held:

> Metropolitan is a privately owned corporation, and it does not lease its facilities from the State of Pennsylvania. It alone is responsible for the provision of power to its customers. In common with all corporations of the State it pays taxes to the State, and it is subject to a form of extensive regulation by the State in a way that most other business enterprises are not. But this was likewise true of the ap-

pellant club in *Moose Lodge No. 107 v. Irvis, supra,* where we said:

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S., at 176-177.

All of petitioner's arguments taken together show no more than that Metropolitan was a heavily regulated, privately owned utility, enjoying at least a partial monopoly in the providing of electrical service within its territory, and that it elected to terminate service to petitioner in a manner which the Pennsylvania Public Utility Commission found permissible under state law. Under our decision this is not sufficient to connect the State of Pennsylvania with respondent's action so as to make the latter's conduct attributable to the State for purposes of the Fourteenth Amendment. *Id.* at 358.

Plaintiff in the instant case has not been able to show that the actions taken by defendant are distinguishable from those taken by Metropolitan in the *Jackson* case, nor has plaintiff shown any other salient facts that would establish the requisite "state action" for a claim under the Fourteenth Amendment.

The requirement in §1983 actions that the challenged activity be "under color of state law" is treated as equivalent to the "state action" requirement for actions under the Fourteenth Amendment. *Parks v. Mr. Ford,* 556 F.2d 132 (3rd Cir. 1977). Therefore, since defendant's activity did not constitute the required "state action" for purposes of the Fourteenth Amendment claim, it does not constitute "under color of state law" activity for the §1983 claim. Plaintiff's Fourteenth Amendment

claims, as well as his §1983 claims, therefore, will be dismissed.

Defendant next moves to dismiss plaintiff's claim under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (hereinafter §794). In essence, defendant contends that 42 U.S.C. §2000 d-3, which limits claims to those where a primary purpose of the federal funding was to provide employment, applies to the instant case and since creating employment was not a primary objective of the Regional Rail Reorganization Act of 1973, plaintiff has no cause of action under §794. Defendant further argues that even assuming plaintiff did have a cause of action under §794, his claim should be dismissed because plaintiff has failed to exhaust his administrative remedies.

Defendant does not contest that there is a right to bring a private action under §794. Despite the absence of express statutory language to that effect, a private right to sue has been found to exist.[1] *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Doe v. Colautti*, 454 F. Supp. 621 (E.D. Pa. 1978); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980). Defendant asserts, however, that any right to bring a private cause of action that may exist under §794 is coextensive with those provided for in Title VI of the 1964 Civil Rights Act. In support of this assertion, defendant points to §120(a) of the Comprehensive Rehabilitation Services Amendments of 1978, codified at 42 U. S. C. §794a(a)(2), which states:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.

1. The United States Supreme Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) held that there is an implied right in actions brought under Title IX of the 1964 Civil Rights Act, leaving little doubt of such a right under Title VI.

> 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act. [29 U. S. C. §794].

In addition, several courts have held that the rights, remedies, and procedures available under §794 are coextensive with those provided for in Title VI of the Civil Rights Act of 1964. *Trageser, supra; Carmi, supra*. This Court agrees in that finding.

Defendant further reasons that if the rights generated under §794 are the same as those available under Title VI, then any restrictions applicable to Title VI are equally applicable to §794. In particular, defendant contends that the restriction embodied in 42 U.S.C. §2000d-4 precludes plaintiff from stating a cause of action in the instant case. Section 2000d-4 provides:

> Nothing contained in this title [42 U. S. C. §§2000d -2000d-4] shall be construed to authorize action under this title [42 U. S. C. §§2000d-2000d-4] by any department or agency with respect to any employment practice of any employee, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

This section has been interpreted by the courts as precluding a judicial remedy under Title VI unless "(1) providing employment is a primary objective of the federal aid, or (2) discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid." *Trageser, supra* at 89. (Footnotes omitted). See also *Carmi, supra*. Further support of this view is found in 49 C.F.R. §§21.5(c)(1),(3)(1979).[2]

---

2. 249 C.F.R. §§21.5(c)(1),(3) reads as follows:

(c) Employment practices:

(1) Where a primary objective of a program of Federal fi-

Since actions brought under §794 are subject to the same restrictions as are actions initiated under Title VI, the restriction set out in 42 U.S.C. §2000d-3 is applicable in the instant case.[3] This finding requires the deter-

nancial assistance to which this part applies is to provide employment, a recipient or other party subject to this part shall not, directly or through contractual or other arrangements, subject a person to discrimination on the ground of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising, hiring, firing, upgrading, promotion, demotion, transfer, layoff, termination, rates of pay or other forms of compensation or benefits, selection for training or apprenticeship, use of facilities, and treatment of employees). Such recipient shall take affirmative action to insure that applicants are employed, and employees are treated during employment, without regard to their race, color, or national origin. The requirements applicable to construction employment under any such program shall be those specified in or pursuant to Part III of Executive Order 11246 or any Executive order which supersedes it.

(2) Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the grounds of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions of paragraph (c)(1) of this section shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.

3. Several courts have apparently not reached this conclusion. *Upshur v. Love*, 474 F. Supp. 332 (N.D. Cal. 1979) (court stated the school district received substantial amounts of federal funds but made no finding of a primary purpose of funds); *Doe v. Colautti*, 454 F. Supp. 621 (E.D. Pa. 1978)(no discussion of primary purpose); *David v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1979) (no discussion of primary purpose). One court has required such a low threshold to establish that a primary purpose of the federal funds is to provide employment as to effectively render the "primary" requirement meaningless. *Guardians Association of N.Y. City Police Department, Inc. v. Civil Service Commission*, 466 F. Supp. 1273 (S.D.N.Y. 1979).

mination of whether a primary objective of the Rail Act was to provide employment or whether the primary beneficiaries were discriminated against.

In 45 U.S.C. §701(b), the purposes of the Rail Act are listed as follows:

> (b) Purposes. — It is therefore declared to be the purpose of Congress in this Act to provide for —
>
> (1) The identification of a rail service system in the midwest and northeast region which is adequate to meet the needs and service requirements of this region and of the national rail transportation system;
>
> (2) the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region;
>
> (3) the establishment of the United States Railway Association, with enumerated powers and responsibilities;
>
> (4) the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities;
>
> (5) assistance to States and local and regional transportation authorities for continuation of local rail services threatened with cessation; and
>
> (6) necessary Federal financial assistance at the lowest possible cost to the general taxpayer.

It is clear from the face of the statute that providing employment was not listed as a primary purpose of the Rail Act. This is not dispositive, however, of whether the primary beneficiaries are assured equality of opportunity

and nondiscriminatory treatment. The "final system plan," with which defendant is obliged to comply if it desires to continue to receive federal assistance[4], lists as one of its goals "the minimization of job losses and associated increases in unemployment and community benefit costs in areas in the region presently served by rail service."

In *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), the Supreme Court held "it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the petitioner." Earlier, the Court indicated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). See also *Mahone v. Waddle*, 564 F.2d 1018 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978). It is not clear beyond doubt that plaintiff could, under no set of facts, support his claim as set forth in the complaint. Although the Court expresses no opinion on the matter, it is possible that plaintiff is a primary beneficiary under §794 and is therefore entitled to equal opportunity and nondiscriminatory treatment. If that be the case and the field tests were conducted as plaintiff alleges, then there is a possibility plaintiff could prevail. Again, the court stresses that this finding is not on the merits but pertains only to the disposition of the motion to dismiss. Because of the foregoing, the court must deny defendant's motion to dismiss plaintiff's claims under §794.

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4. 45 U. S. C. §747, entitled "Protection of Federal Funds - (b) Report," provides that a report shall be submitted to Congress annually and shall include, *inter alia*, "the degree to which the goals of section 206(a) of this act [45 U. S. C. §716(a)] are being met."

Defendant argues that even if plaintiff has stated a valid claim under §794, his complaint should be dismissed because of his failure to exhaust administrative remedies. In light of the Supreme Court's ruling in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), it appears unlikely that exhaustion of administrative remedies would be required.[5] The Court rejected the argument that "individual suits are inappropriate in advance of exhaustion of administrative remedies," (*Id.* at 708 n. 41), noting that "the individual complainant is not allowed to participate in the investigation or subsequent enforcement proceedings, that a voluntary compliance agreement need not include relief for a complainant, and that a complete cut-off of federal funds was not an appropriate remedy for an individual complainant." *Upshur v. Love*, 474 F. Supp. 332, 341 n. 23 (N.D. Cal. 1979) (citing *Cannon, supra*, at 708 n. 41).

The court in *Upshur* found, however, that it need not decide whether or not plaintiff in a §794 action must exhaust administrative remedies, since at the time the complaint was filed no administrative remedies were available. *Upshur, supra* at 341. The administrative remedies available to the plaintiff in the instant case did not take effect until July 2, 1979. Plaintiff filed his complaint on September 22, 1978. Even if exhaustion of administrative remedies is required for claims under §794,

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5. Although *Cannon* is a case involving Title IX, "the regulations implementing Section 504 [42 U.S.C. §794] adopt the Title VII enforcement procedures, 45 C.F.R. §84.61, the same administrative mechanisms used to enforce Title IX, 45 C.F.R. §86.71. Thus the concerns expressed by the Court in *Cannon* with respect to the adequacy of Title IX administrative remedies would also apply to complaints under Section 504 [42 U.S.C. §794]." *Upshur v. Love*, 474 F. Supp. 332, 341 n.23 (N.D. Cal. 1979).

that requirement would not be applicable in the instant case. Defendant's motion to dismiss for failure to exhaust administrative remedies will be denied.

Sylvia H. Rambo
United States District Judge

Dated: November 4, 1980

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE,
Plaintiff

v.

CONSOLIDATED RAIL CORPORATION,
Defendant

Civil Action
No. 78-0944

ORDER

NOW, THIS 4th day of November 1980, the following is ordered:

1. Defendant's motion to dismiss plaintiff's claim based upon the equal protection clause of the Fourteenth Amendment is granted.
2. Defendant's motion to dismiss plaintiff's claim based upon the Civil Rights Act, 42 U.S.C. §1983, is granted.
3. Defendant's motion to dismiss plaintiff's claim based upon section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, is denied.

A discussion of the relevant law is embodied in the memorandum filed herewith.

Sylvia H. Rambo
United States District Judge

AMENDED JUDGMENT
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LE STRANGE, *Plaintiff*	:	
v.	:	Civil Action No. 78-0944 Judgment
CONSOLIDATED RAIL CORPORATION, *Defendant*	:	

This action came before the Court, Honorable Sylvia H. Rambo, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that pursuant to the Opinion and Order filed on October 20, 1981, judgment be and hereby is entered in favor of the defendant CONSOLIDATED RAIL CORPORATION and against the plaintiff THOMAS LE STRANGE on the issue of plaintiff's standing to bring a private action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

Dated at Harrisburg, Pennsylvania, this 29th day of October 1981.

_____

Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 81-2943
LESTRANGE, THOMAS
v.
CONSOLIDATED RAIL CORPORATION
Thomas J. LeStrange, *Appellant*
(D.C. Civil No. 78-0944)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA —
SCRANTON

Present: ADAMS and WEIS, *Circuit Judges* and BLOCH, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit, Rule 12(6), June 8, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 26, 1981, be, and the same is hereby reversed and the cause remanded for further proceedings in accordance with the opinion of this Court. Costs taxed against appellee.

ATTEST:

Clerk

September 1, 1982

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* The Honorable Alan Bloch, United States District Judge for the Western District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 81-2943
Re: THOMAS LE STRANGE, *Appellant*
v.
CONSOLIDATED RAIL CORPORATION

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until October 22, 1982.

Circuit Judge

Dated: September 21, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 81-2943
THOMAS LE STRANGE, *Appellant*
v.
CONSOLIDATED RAIL CORPORATION

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby further stayed until November 22, 1982.

Circuit Judge

Dated: October 25, 1982

Office-Supreme Court, U.S.
FILED
MAY 11 1983
ALEXANDER L. STEVAS,

No. 82-862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 22, 1982
CERTIORARI GRANTED FEBRUARY 22, 1983

*Counsel of Record

No. 82-862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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Plaintiff's Exhibit B — Conrail 1979 seniority roster for Engine Service, Seniority District G — attached to Plaintiff's Brief in Opposition to Motion for Summary Judgment A-20

Plaintiff's Exhibit C — Conrail Engineer Roster for Hoboken second and third subdivision — attached to Plaintiff's Brief in Opposition to Motion for Summary Judgment A-22

Plaintiff's Exhibit D — Affidavit of Thomas LeStrange, dated September 25, 1981 — attached to Plaintiff's Brief in Opposition to Motion for Summary Judgment A-23

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The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for a Writ of Certiorari:

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

September 22, 1978 — Plaintiff LeStrange's complaint filed in United States District Court for the Middle District of Pennsylvania.

October 26, 1979 — Plaintiff's Amended Complaint filed.

December 3, 1979 — Motion to Dismiss filed by Defendant Consolidated Rail Corporation.

November 4, 1980 — Order of Judge Rambo entered, granting Defendant's Motion to Dismiss Plaintiff's claims based upon the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act, 42 U.S.C. §1983, and denying Defendant's Motion to Dismiss Plaintiff's claim based upon §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794.

December 11, 1980 — Defendant's Answer to Plaintiff's Amended Complaint filed.

September 11, 1981 — Defendant's Motion for Summary Judgment filed.

October 20, 1981 — Order of Judge Rambo entered, granting Defendant's Motion for Summary Judgment on the issue of Plaintiff's standing to bring a private action under Section 504 of the Rehabilitation Act of 1973.

October 26, 1981 — Amended Judgment of District Court entered.

November 19, 1981 — Plaintiff's notice of appeal filed.

September 1, 1982 — Opinion and Judgment of the Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LESTRANGE,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	No. 78-944
	:	Jury Trial
CONSOLIDATED RAIL CORP.,	:	Demanded
	:	
Defendant	:	

AMENDED COMPLAINT

Now comes Plaintiff by his attorneys, Lenahan, Dempsey & Piazza, and for his Amended Complaint states the following:

1. Plaintiff, Thomas LeStrange is a handicapped individual, who resides at 1422 Olive Street, Scranton, Pennsylvania.

2. Defendant, Consolidated Rail Corporation (Conrail) is a railroad corporation duly organized and existing under and by virtue of the laws of the United States of America, specifically 45 U.S.C. Section 701, et. seq., and 45 U.S.C. Section 801, et. seq.; Conrail is presently doing business within the jurisdiction of this Court as an interstate Common Carrier with its local office located at 613 North Elmer Avenue, Savre, Pennsylvania.

3. This aciton [sic] is based upon a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. Section 1973, and 29 U.S.C. 794, commonly referred to as the "Rehabilitation Act of 1973" (as amended)

4. Subject matter jurisdiction is conferred upon this Court by virtue of 28 U.S.C. Section 1343(3), 28 U.S.C. Section 1331(a) and 42 U.S.C. Section 1983.

Conrail, as a recipient of Federal financial assistance, is subject to the jurisdiction of the "Rehabilitation Act of 1973", as aforesaid.

COUNT ONE

5. The plaintiff incorporates by reference all of the allegations contained in paragraphs one through four, inclusive, as though the same were fully set forth at length herein.

6. On March 17, 1971, plaintiff suffered the amputation of his left hand and a portion of his left forearm. Prior to that time, the plaintiff had been employed as a Locomotive Engineer with the Erie Lackawanna Railroad.

7. On April 17, 1971, plaintiff reported for work as an engineer with the Erie Lackawanna Railroad but was refused employment without a medical evaluation or a hearing.

8. During 1973, Conrail became a successor in interest to the Erie Lackawanna Railroad and the defendant refused to employ the plaintiff without medical evaluation or hearing.

9. From 1973 to April 4, 1978, the defendant refused to employ the plaintiff in any capacity and said refusal was made without benefit of medical evaluation or hearing, even though the plaintiff was at all times ready, willing and able to work as an engineer.

10. On April 4, 1978, Conrail authorized a medical examination for the plaintiff to determine his employability. On May 2, 1978, the defendant, without a hearing, classified the plaintiff as not qualified for the occupation of engineer.

11. From 1973 to the present, the plaintiff has repeatedly requested to be re-employed as a Locomotive Engineer and has, in the alternative, requested that a hearing be held to determine his fitness for the aforesaid position. All of said requests have been summarily de-

nied by the defendant. At the present time, the plaintiff remains ready, willing and able to return to work.

WHEREFORE, plaintiff demands judgment against the defendant as follows:

1. Enjoining the defendant from continuing in its discriminatory hiring practices of refusing to hire qualified handicapped individuals;
2. Reinstatement of plaintiff in his former employment position or the equivalent thereof;
3. For a sum of money equal to plaintiff's full back pay, including regular periodic increases allotted to his position;
4. Attorney's fees, costs, and such other relief as the Court believes proper.

COUNT TWO

12. Plaintiff incorporates by reference all of the allegations contained in Paragraphs One through Eleven, inclusive, as though the same were fully set forth at length herein.

13. On February 15, 1979, Conrail scheduled a field test for the plaintiff in order to determine whether the plaintiff could perform the duties of a yard engineer.

14. The field test created by ConRail to determine Plaintiff's employability as a yard engineer was willfully and purposely prepared in such a manner so as to insure Plaintiff's failure, in that the test:

(a) contained duties which were rarely or never performed by a yard engineer;
(b) contained duties which were performed with the assistance of other railroad employees;
(c) was created with special duties which could only be performed by an individual with full use of both hands.

15. Notwithstanding the unusual duties included in the field test as aforesaid, the plaintiff was able to perform substantially all of these duties and particularly, those duties which are normally performed by a yard engineer.

16. Due to the numerous irregularities of the first field test, a second, revised, field test was to exclude those duties not normally performed by a yard engineer and it was to be administered by different ConRail officials. Further, the second test was to be administered on a yard engine and not on the locomotive used outside of the yard.

17. The second field test was willfully and purposely created in order to disqualify the plaintiff as a yard engineer in that:

(a) the test was to be administered by the same individuals who administered the first test;
(b) certain railroad equipment, to be used in the test, was concealed or placed in inaccessible areas;
(c) plaintiff was informed that his failure to complete all of the duties in the first test would insure his failure on the second test;
(d) plaintiff was to be tested on three different locomotives, rather than on the locomotive normally used in the railroad yard.

18. By virtue of all of the foregoing irregularities, plaintiff refused to submit to the second test created by the defendant.

19. The defendant has since 1973 willfully and maliciously delayed the scheduling of medical examinations for the plaintiff and has also ignored the various medical reports which released the plaintiff for work.

20. The defendant has maliciously, willfully and purposely discriminated against the plaintiff since 1973, solely because the plaintiff is handicapped. Despite the fact that the plaintiff has at all times been ready, willing

and able to return to gainful employment with Conrail, the defendant has refused to rehire the plaintiff as an engineer.

WHEREFORE, the plaintiff, Thomas LeStrange, requests that This Court make an award of punitive damages in addition to the relief sought in Count One.

LENAHAN, DEMPSEY & PIAZZA

By _____
William J. Dempsey

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Thomas LeStrange	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
CONSOLIDATED RAIL CORPORATION	:	No. 78-944
	:	
	:	
Defendant	:	

ANSWER OF DEFENDANT CONSOLIDATED RAIL CORPORATION TO PLAINTIFF'S AMENDED COMPLAINT

Comes now defendant Consolidated Rail Corporation (hereinafter "Conrail") and answers plaintiff's amended complaint as follows.

FIRST DEFENSE

1. Denied.
2. Admitted.
3. Admitted that plaintiff purports to bring this action under statutes referred to in paragraph 3 but denied that said action is properly brought under those statutes.
4. Admitted that plaintiff purports to bring this action under statutes referred to in paragraph 4 but denied that said action is properly brought under those statutes.
5. Defendant Conrail incorporates the answers to paragraphs 1 through 4 above, as if fully set forth herein.
6. Admitted that plaintiff was formerly employed by the Erie-Lackawanna Railroad. Defendant Conrail lacks knowledge to respond to the balance of the averments in this paragraph.

7. Defendant Conrail lacks knowledge to respond to the averments in this paragraph.

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Defendant Conrail incorporates the answers to paragraphs 1 through 11 above, as if fully set forth herein.

13. Admitted.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

SECOND DEFENSE

This court lacks subject matter jurisdiction over plaintiff's complaint.

THIRD DEFENSE

Plaintiff's amended complaint fails to state claim upon which relief can be granted by this court.

FOURTH DEFENSE

Plaintiff has failed to exhaust administrative remedies under the Railway Labor Act, 45 U.S.C.A. §151-188.

FIFTH DEFENSE

Defendant Conrail is not a successor in interest to the Erie-Lackawanna Railroad by virtue of the Regional Rail Reorganization Act of 1973, 45 U.S.C.A. §701 et seq., and other applicable law.

SIXTH DEFENSE

Plaintiff has failed to join a person, the Erie-Lackawanna Railroad, in whose absence complete relief cannot be accorded to plaintiff.

Respectfully submitted,

Dennis Alan Arouca
1138 Six Penn Center
Philadelphia, PA 19104
215-977-4996

Lorraine C. Staples
1138 Six Penn Center
Philadelphia, PA 19104
215-977-4996

Cody H. Brooks
Henkelman, Krader,
O'Connell & Brooks
200 Bank Towers
Spruce Street & Wyoming Ave.
Scranton, PA 18501
717-346-7922

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

THOMAS LESTRANGE,	:	
	:	
Plaintiff	:	
	:	CIVIL ACTION
v.	:	
	:	No. 78-944
CONSOLIDATED RAIL CORPORATION,	:	
	:	
Defendant	:	

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, defendant Consolidated Rail Corporation moves the Court for summary judgment in its favor on the issue of plaintiff's standing to bring a private action under Section 504 of the Rehabilitation Act of 1973. Summary judgment in Conrail's favor is appropriate because, as set out in the accompanying Memorandum of Law, plaintiff cannot show either that (1) the primary objective of federal financial assistance to Conrail is to provide employment or (2) that he is a primary beneficiary of a federally funded program which has a primary objective of providing employment.

Respectfully submitted,

LORRAINE C. STAPLES
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-1854

CODY H. BROOKS
Henkelman, Kreder, O'Connell & Brooks
200 Bank Towers
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Scranton, PA 18501
(701) 346-7922
Attorneys for Defendant
CONSOLIDATED RAIL CORPORATION

OF COUNSEL:

MORGAN, LEWIS & BOCKIUS

COMMONWEALTH OF PENNSYLVANIA :
: ss
COUNTY OF PHILADELPHIA :

I, RICHARD SEMERAD, being duly sworn, depose and say as follows:

1. I am the Director-Investments and Collections for Consolidated Rail Corporation with offices at 1300 Six Penn Center Plaza, Philadelphia, Pennsylvania.

2. In this capacity, I am responsible for preparation of forecasts used in periodic requests to the United States Railway Association (USRA) for disbursements under the Regional Rail Reorganization Act of 1973 (the Rail Act) and am familiar with the use to which funds received are put.

3. I have held my present position since October, 1977 and have been directly or indirectly responsible for the preparation of such forecasts since April, 1976. Prior to that time, I was an employee of Penn Central working on loan as controller of a company under contract with Penn Central to liquidate non-rail properties of the railroad.

4. Under the Rail Act, Conrail has received the following sums of money from the USRA:

(a) $317,800,000.00 under Title V; and
(b) $3.28 billion under §216.

5. All money received under Title V was a reimbursement to Conrail for money paid out by Conrail pursuant to the employee protective benefits imposed on Conrail by Title V.

6. Federal funds received under §216 were used to update Conrail's facilities and equipment, to pay principal and interest on outstanding debt obligations and to cover the operating expenses not met by operating revenues.

7. Exhibit A, attached hereto, sets forth the use of §216 money received by Conrail as of March 31, 1981.

8. All §216 money received by Conrail since March 31 has been spent in the same general categories.

9. Money received to reimburse Conrail's loss on Operations, along with cash generated by Operations, is used to meet day-to-day operating expenses. A specific accounting of the final use of each federal dollar allocated to that category would therefore be impossible.

_____

RICHARD SEMERAD

Sworn to and subscribed before me this 10th day of September, 1981.

_____

Notary Public

EXHIBIT A

- CONRAIL BORROWED $3,200,000 FROM USRA THROUGH 3/31/81.
- FROM THESE BORROWINGS, THE FOLLOWING EXPENDITURES WERE MADE:

	THROUGH 3/31/81
TRACK REHABILITATION	$1,453
A&I WORK	463
INSTALLMENT OF EQUIP. DEBT	610
EQUIPMENT IMPROVEMENTS	197
CASH LOSS ON OPERATIONS	631
PROPERTY SALES & OTHER ITEMS	(154)
TOTAL BORROWINGS	$3,200

Exhibit A

CONSOLIDATED RAIL CORPORATION

SENIORITY ROSTER 1980

ENGINE SERVICE — SENIORITY DISTRICT "G"

Rank	Employee Name		Employee Number	Prior RR	Prior Rights Roster	Prior Seniority Date	Conrail Fireman Date	Conrail Engineer Date
937	Klinger	BF	066066	PC	0028	11/04/42	4/01/76	4/01/76
938	Zeigler	BH	066624	PC	0028	11/04/42	4/01/76	4/01/76
939	Miller	JP	864561	RDG	0002	11/10/42	4/01/76	4/01/76
940	Wells	HJ	864563	RDG	0002	11/10/42	4/01/76	4/01/76
941	Marter	CA	066151	PC	0028	11/11/42	4/01/76	4/01/76
942	Casey	JJ	022847	PC	0029	11/18/42	4/01/76	4/01/76
943	Lindstrom	JH	025310	PC	0029	11/18/42	4/01/76	4/01/76
944	Jones	TE	087391	PC	0012	11/21/42	4/01/76	4/01/76
945	Owens	WF	046201	PC	0013	11/24/42	4/01/76	4/01/76
946	Harrison	WE	087293	PC	0012	12/02/42	4/01/76	4/01/76
947	Campbell	J	024839	PC	0029	12/04/42	4/01/76	4/01/76
948	Patterson	FG	853453	LV	0003	12/12/42	4/01/76	4/01/76
949	Mitchell	JS	087619	PC	0012	12/14/42	4/01/76	4/01/76
950	Jefferies	JW	066000	PC	0028	12/16/42	4/01/76	4/01/76
951	Terrasi	LJ	023161	PC	0029	12/21/42	4/01/76	4/01/76
952	Boyd	LJ	086907	PC	0012	12/22/42	4/01/76	4/01/76
953	Schoffner	RE	864566	RDG	0001	12/23/42	4/01/76	4/01/76
954	Mignanelli	A	023024	PC	0029	12/23/42	4/01/76	4/01/76
955	Walter	PE	025838	PC	0029	12/28/42	4/01/76	4/01/76
956	Krout	DB	087465	PC	0012	12/28/42	4/01/76	4/01/76
957	Kasson	TD	025220	PC	0029	12/28/42	4/01/76	4/01/76
958	Warrenfeltz	MG	087999	PC	0012	12/31/42	4/01/76	4/01/76
959	Clayton	RO	024880	PC	0029	1/11/43	4/01/76	4/01/76
960	Cominski	WE	024894	PC	0029	1/14/43	4/01/76	4/01/76
961	Swisher	WD	066514	PC	0028	1/14/43	4/01/76	4/01/76
962	Wicks	SW	876533	CNJ	0002	1/15/43	4/01/76	4/01/76
963	Schuster	S	023132	PC	0029	1/22/43	4/01/76	4/01/76
964	Dressler	GH	853435	LV	0003	1/30/43	4/01/76	4/01/76
965	Haverty	AP	082180	PC	0011	2/02/43	4/01/76	4/01/76
966	Franchino	D	896770	EL	0488	2/03/43	4/01/76	4/01/76
967	Maguire	RT	046022	PC	0013	2/11/43	4/01/76	4/01/76
968	Sipple	JP	892343	EL	0488	2/11/43	4/01/76	4/01/76
969	Lobichusky, Sr.	JJ	025316	PC	0029	2/12/43	4/01/76	4/01/76
970	Jobes	FC	031043	PC	0014	2/16/43	4/01/76	4/01/76

971	Pepper	G	882142	EL	0487	2/19/43	4/01/76	4/01/76
972	Ensminger	HR	A00830	PC	0028	2/24/43	4/01/76	4/01/76
973	Armstrong, Jr.	ES	065515	PC	0028	2/24/43	4/01/76	4/01/76
974	Fuller	RD	897035	EL	0488	2/27/43	4/01/76	4/01/76
975	Donley	WB	045713	PC	0013	3/03/43	4/01/76	4/01/76
976	Lillibridge	LS	010003	EL	0494	3/03/43	4/01/76	4/01/76
977	Russ	CH	025631	PC	0029	3/06/43	4/01/76	4/01/76
978	Sulzbach	HC	W00226	EL	0494	3/08/43	4/01/76	4/01/76
979	Gore	CE	W00227	EL	0494	3/09/43	4/01/76	4/01/76
980	Duryea	EH	W00228	EL	0494	3/16/43	4/01/76	4/01/76
981	Magee	J	046018	PC	0013	3/16/43	4/01/76	4/01/76
982	Post	RT	025571	PC	0029	3/23/43	4/01/76	4/01/76
983	Howell	RH	W00229	EL	0494	3/23/43	4/01/76	4/01/76
984	Heins	WA	022949	PC	0029	3/25/43	4/01/76	4/01/76
985	Ross	FR	W00230	EL	0494	3/25/43	4/01/76	4/01/76
986	Brosky	M	876614	CNJ	0002	3/28/43	4/01/76	4/01/76
987	Holloway	RL	031035	PC	0014	3/30/43	4/01/76	4/01/76
988	Martin	SS	864574	RDG	0003	3/30/43	4/01/76	4/01/76
989	Readinger	CE	864473	RDG	0002	4/21/43	4/01/76	4/01/76
990	Pardee	D	025528	PC	0029	4/26/43	4/01/76	4/01/76
991	Mullen	RJ	864978	RDG	0003	5/01/43	4/01/76	4/01/76
992	Tunney	JF	896791	EL	0493	4/01/43	4/01/76	4/01/76
993	Mulrooney	JG	897030	EL	0493	4/03/43	4/01/76	4/01/76
994	Reuther	EG	896788	EL	0493	5/07/43	4/01/76	4/01/76
995	Chickello	A	010004	EL	0493	5/08/43	4/01/76	4/01/76
996	Wetmore	H	897022	EL	0493	5/15/43	4/01/76	4/01/76
997	Karabin	G	010005	EL	0493	5/16/43	4/01/76	4/01/76
998	Millard, Jr.	CV	896776	EL	0493	5/20/43	4/01/76	4/01/76
999	Lestrange	TJ	W00231	EL	0493	6/04/43	4/01/76	4/01/76
1000	Olexy	SF	895682	EL	0493	6/09/43	4/01/76	4/01/76
1001	Burkhart	JS	895680	EL	0493	6/19/43	4/01/76	4/01/76
1002	Evans	WD	010006	EL	0493	6/25/43	4/01/76	4/01/76
1003	Scott	AC	882061	EL	0487	7/14/43	4/01/76	4/01/76
1004	Preston	JR	895681	EL	0493	7/14/43	4/01/76	4/01/76
1005	Vansiooten	H	882062	EL	0487	7/22/43	4/01/76	4/01/76
1006	Kellogg	RL	895671	EL	0493	8/04/43	4/01/76	4/01/76
1007	Balas, Jr.	PG	024748	PC	0029	8/05/43	4/01/76	4/01/76
1008	Keister, Jr.	JL	066030	PC	0028	8/10/43	4/01/76	4/01/76
1009	Bailey	GC	300102	PRSL	0003	8/10/43	4/01/76	4/01/76
1010	Sullivan, Jr.	JJ	882063	EL	0487	8/11/43	4/01/76	4/01/76
1011	Boshek	JA	895580	EL	0488	8/11/43	4/01/76	4/01/76
1012	Starling	WD	882064	EL	0487	8/13/43	4/01/76	4/01/76
1013	Hryn	JJ	025176	PC	0029	8/16/43	4/01/76	4/01/76
1014	Galanot	EL	025063	PC	0029	8/17/43	4/01/76	4/01/76

Exhibit B

CONSOLIDATED RAIL CORPORATION

SENIORITY ROSTER 1978

ENGINE SERVICE — SENIORITY DISTRICT "G"

Rank	Employee Name		Employee Number	Prior RR	Prior Rights Roster	Prior Seniority Date	Conrail Fireman Date	Conrail Engineer Date
1249	Millard Jr.	CV	896776	EL	0493	5/20/43	4/01/76	4/01/76
1250	LeStrange	TJ	W00231	EL	0493	6/04/43	4/01/76	4/01/76
1251	Olexy	SF	895682	EL	0493	6/09/43	4/01/76	4/01/76
1252	Burkhart	JS	895680	EL	0493	6/19/43	4/01/76	4/01/76
1253	Evans	WD	C10006	EL	0493	6/25/43	4/01/76	4/01/76
1254	Cohn	HS	024850	PC	0029	7/14/43	4/01/76	4/01/76
1255	Scott	AC	882061	EL	0487	7/14/43	4/01/76	4/01/76
1256	Preston	JR	895681	EL	0493	7/14/43	4/01/76	4/01/76
1257	VanSlooten	H	882062	EL	0487	7/22/43	4/01/76	4/01/76
1258	Dimarino	HJ	087082	PC	0012	7/22/43	4/01/76	4/01/76
1259	Kellogg	RL	895671	EL	0493	8/04/43	4/01/76	4/01/76
1260	Balas Jr.	PG	014748	PC	0029	8/05/43	4/01/76	4/01/76
1261	Keister Jr.	JL	066030	PC	0028	8/10/43	4/01/76	4/01/76
1262	Bailey	GC	300101	PRSL	0003	8/10/43	4/01/76	4/01/76
1263	Horan	FJ	867571	RDG	0003	8/10/43	4/01/76	4/01/76
1264	Sullivan Jr.	JJ	882063	EL	0487	8/11/43	4/01/76	4/01/76
1265	Boshek	JA	895580	EL	0488	8/11/43	4/01/76	4/01/76
1266	Stateja	JJ	031089	PC	0014	8/13/43	4/01/76	4/01/76
1267	Starling	WD	882064	EL	0487	8/13/43	4/01/76	4/01/76
1268	Hryn	JJ	025176	PC	0029	8/16/43	4/01/76	4/01/76
1269	Galanot	EL	025063	PC	0029	8/17/43	4/01/76	4/01/76
1270	Pedlock	J	C10007	EL	0511	8/23/43	4/01/76	4/01/76
1271	Smith	GC	066442	PC	0028	8/24/43	4/01/76	4/01/76
1272	Statkevicus	J	852621	LV	0003	8/30/43	4/01/76	4/01/76
1273	Thurston	WS	025802	PC	0029	8/31/43	4/01/76	4/01/76
1274	Johnston	RM	066004	PC	0028	9/07/43	4/01/76	4/01/76
1275	Williams	RE	864437	RDG	0002	9/08/43	4/01/76	4/01/76
1276	Regan	TG	895685	EL	0493	9/09/43	4/01/76	4/01/76
1277	Deprimo	CA	895666	EL	0493	9/09/43	4/01/76	4/01/76
1278	Tompkins	AR	852622	LV	0003	9/15/43	4/01/76	4/01/76

1279	Baginski	EF	022811	PC	0029	10/11/43	4/01/76	4/01/76
1280	Adams	WB	W00232	EL	0494	10/11/43	4/01/76	4/01/76
1281	Burke	JJ	024824	PC	0029	10/12/43	4/01/76	4/01/76
1282	Latini	MB	W00233	EL	0494	10/20/43	4/01/76	4/01/76
1283	Latini	GJ	W00234	EL	0494	10/22/43	4/01/76	4/01/76
1284	Bottum	GL	864595	RDG	0003	10/25/43	4/01/76	4/01/76
1285	Ganser	R	876491	CNJ	0002	10/27/43	4/01/76	4/01/76
1286	Kunkle	KH	852257	LV	0001	10/28/43	4/01/76	4/01/76
1287	Crane	R	885296	EL	0487	11/03/43	4/01/76	4/01/76
1288	Renn	VS	864597	RDG	0003	12/01/43	4/01/76	4/01/76
1289	Vandermark	CE	885286	EL	0487	12/02/43	4/01/76	4/01/76
1290	Donahue Jr	D	851665	CNJ	0002	12/04/43	4/01/76	4/01/76
1291	Zechman	AA	864600	RDG	0003	12/21/43	4/01/76	4/01/76
1292	Hartley	DC	853442	LV	0003	12/29/43	4/01/76	4/01/76
1293	Batz	RN	024766	PC	0029	12/31/43	4/01/76	4/01/76
1294	Lutzko Jr	J	876612	CNJ	0002	1/06/44	4/01/76	4/01/76
1295	Brommer	CF	865146	RDG	0002	1/06/44	4/01/76	4/01/76
1296	Murray	JM	025459	PC	0029	1/07/44	4/01/76	4/01/76

Exhibit C

CONSOLIDATED RAIL CORPORATION

ROSTER OF ENGINEERS

(Former Erie-Susquehanna 2nd Sub Divn.)

HOBOKEN 3RD SUB DIVISION

Rank No.		Name	Acc't. No.	Birth Date	Entered Service	Date Promoted Engineer
1.	FA	G. Hazleton, Jr.		10/30/19	8/24/41	12/11/56
2.		D. T. Maltby	882158	10/02/19	8/28/41	12/13/56
3.	FA	E. J. Ruefer		10/20/15	10/29/41	12/14/56
4.		W. R. Olver	884651	6/22/22	7/27/42	3/27/57
5.		A. H. Maillet, Jr.	883361	10/08/17	10/27/42	4/01/57
6.	FA	H. C. Sulzbach		10/25/14	3/08/43	4/03/57
7.		C. E. Gore	885381	6/15/17	3/09/43	10/24/60
8.	FA	F. R. Ross	882161	11/12/13	3/25/43	10/28/60
9.	FA	W. B. Adams	885880	7/02/16	10/11/43	11/08/60
10.		M. B. Latini	882163	11/13/19	10/20/43	11/09/60
11.		G. J. Latini	882162	6/07/18	10/22/43	11/10/60
12.		R. A. Moureaux	882160	10/14/12	1/15/44	11/11/60
13.		D. W. Mosher	885093	1/20/25	6/28/45	11/14/60
14.		D. C. Engelhart	883365	1/26/26	5/12/59	3/14/64
15.		J. W. Bogach	882038	8/01/36	5/15/59	3/14/64
16.		E. D. Mosher, Jr.	888755	10/16/34	7/10/59	3/14/64
17.		O. R. Swingle	882940	4/19/28	10/01/59	3/14/64
18.		J. G. Davis	884599	12/05/32	12/18/59	3/14/64
19.		T. H. McKeeby	882942	4/19/38	5/07/60	2/27/65

ROSTER OF ENGINEERS
FORMER LACKAWANNA — SCRANTON DIVN.
HOBOKEN 2ND SUB. DIVN.

Rank No.		Name	Acc't. No.	Entered Service	Date Promoted Engineer	Seniority Del. Divn.
20.		J. F. Tunney	896791	5/01/43	8/05/55	10/17/60
21.		E. J. Ruether	896788	5/07/43	8/09/55	10/17/60
22.		H. Wetmore	897022	5/15/43	8/11/55	10/17/60
23.		C. V. Millard	896776	5/20/43	10/04/55	10/17/60
24.	FA	T. J. Lestrange		6/04/42	10/04/55	10/17/60
25.		S. F. Olexy	895682	6/09/43	10/04/55	10/17/60
26.		J. R. Preston	895681	7/14/43	12/07/55	10/17/60
27.		T. Regan	895685	9/09/43	12/19/55	10/17/60
28.		C. DePrimo	895666	9/09/43	12/19/55	10/17/60

Exhibit D

Commonwealth of Pennsylvania :
: ss
County of Lackawanna :

I, THOMAS J. LeSTRANGE, hereby swear and affirm the following:

1. In 1970, I took a leave of absence from the Erie Lackawanna Railroad.

2. Prior to that time, and subsequent to that leave of absence, I was part of the collective bargaining agreement made by the Erie Lackawanna and my union.

3. From 1976 through 1981, I have been on the seniority rosters of ConRail.

4. To the best of my knowledge, I am now subject to the collective bargaining agreement between ConRail and my union.

_____
Thomas J. LeStrange

Sworn to and subscribed
before me this 25th day
of September, 1981.

_____
Notary Public

Commonwealth of Pennsylvania :
: ss:
County of Philadelphia :

AFFIDAVIT OF JAMES P. LEACH

I, JAMES P. LEACH, having been duly sworn according to law, depose and say:

1. I am Director — Title V Administration for Consolidated Rail Corporation with offices at 1234 Six Penn Center Plaza, Philadelphia, a position I have held since December, 1979. In that capacity I am responsible for the implementation and monitoring of the labor protection program established by Title V of the Regional Rail Reorganization Act, as amended.

2. Prior to becoming Director, I was Acting Director beginning in August, 1978. During 1977 I functioned as Manager — Title V Administration. I have spent 40 years actively involved in labor relations in the railroad industry. From my background I am generally familiar with the manner in which Conrail has implemented Title V.

3. In accordance with the requirements of Section 502(b) of the Regional Rail Reorganization Act of 1973 Conrail extended an offer of continuity of the employment relationship effective April 1, 1976 to *each* employee of "a railroad in reorganization in the region," as defined in Section 102(14) and (15) of the Rail Act (and including the Erie-Lackawanna Railroad), who had not already accepted employment with the United States Railway Association. Conrail construed these offers to be accepted unless rejected in writing. Attached is an accurate copy of the notice of continuation of employment sent to people absent because of disability or on leave of absence. A copy of this letter was sent to Thomas LeStrange.

4. Conrail construed these offers as an offer of an employment relationship rather than an offer of active employment because the number of employees of the railroads in reorganization greatly exceeded the number of positions available with Conrail. Basically, these offers did not change any employee's status on April 1, 1976 — active employees remained as active employees, furloughed employees continued in that status, and employees absent due to disability or leave of absence continued in their respective states. Statistically this meant that Conrail had 149,498 employees as of April 1, 1976. However, attachment 2 to this Affidavit, I.C.C. Wage Statistics Form B which Conrail is required to submit to the I.C.C., shows that only between 94,000 and 100,429 employees were actively employed in April of 1976.

5. Subsequent to April 1, 1976, as Conrail began to consolidate its workforce, active employees were put into surplus status, that is they did not work. Statistically, this is reflected in attachment 3 to this Affidavit which is a copy of I.C.C. Wage Statistics Form B which shows that in calendar year 1980, Conrail had between 79,574 and 85,182 active employees.

6. Conrail received no money from the Federal Government pursuant to Section 509 of the Rail Act for costs of administration of Title V. Nor has Conrail used any money potentially available under Title V for training costs referred to in Section 509. Such funding for training was only available as of October 1, 1980, when the Staggers Rail Act was passed and shortly thereafter it became apparent that Title V would be repealed. This repeal was effective September 1, 1981. The money

available under Title V was used to reimburse Conrail for benefits paid to or for the benefit of employees pursuant to Section 505 of the Rail Act.

JAMES P. LEACH

Sworn to and subscribed
before me this 2nd day
of October, 1981.

Notary Public

February 26, 1976

NOTICE

TO: Employees represented by labor organizations on the following properties:

Ann Arbor Railroad Company, The Central Railroad Company of New Jersey, Chicago River and Indiana Railroad Company, Dayton Union Railway Company, Erie Lackawanna Railway Company, Indianapolis Union Railway Company, Ironton Railroad Company, Lehigh and Hudson River Railway Company, Lehigh and New England Railway Company, Lehigh Valley Railroad Company, The New York and Long Branch Railroad Company, Penn Central Transportation Company (except employees of Canada Southern), Pennsylvania-Reading Seashore Lines, Peoria and Eastern Railway Company, Raritan River Railroad Company, Reading Company, Union Depot Company, Columbus, Ohio.

Effective April 1, 1976, rail properties of railroads in reorganization and certain of their subsidiaries as designated in the United States Railway Association's Final System Plan will be conveyed to Consolidated Rail Corporation (hereinafter referred to as "ConRail"). ConRail will assume jurisdiction over the operation and control of certain properties conveyed in accordance with the provisions of the Regional Rail Reorganization Act of 1973 (PL 93-236), as amended.

As provided for in Section 502(b) of the Regional Rail Reorganization Act and Article II(a) of the Single Implementing Agreement dated July 23, 1975, between ConRail and participating labor organizations, all employees actively employed on the above named properties, who have not accepted employment with a railroad acquiring property pursuant to the Final System Plan, are hereby offered employment with ConRail to become

effective on the date of conveyance, April 1, 1976. This offer of employment is in the same class or craft in which you are actively employed, and you will not lose any seniority held in any other craft or class on the ConRail System.

This offer of employment will be considered as having been automatically accepted unless you specifically decline by written notice to Mr. A. E. Egbers, Vice President-Labor Relations, Consolidated Rail Corporation, 1818 Market Street, Fifteenth Floor, Philadelphia, Pennsylvania 19103 not later than March 15, 1976.

Unless otherwise advised, employees who accept employment with ConRail and who are working on rail properties being conveyed to ConRail shall be assigned to the same positions on the day of conveyance, April 1, 1976, that they held immediately prior to such date, and will report at the same time and same location and work under their respective collective bargaining agreements.

If employees' jobs are to be abolished incident to the conveyance or discontinuance of service under the provisions of the Act, or otherwise will not be available to them, further notice will be given to such employees and they may exercise seniority under the rules in effect for the class or craft in which they are working.

Richard D. Spence
President and Chief
Operating Officer

Form Title V-1

February 26, 1976

Enclosed is a copy of my notice dated February 26, 1976 offering employment to all employees of railroads in reorganization and certain of their subsidiary properties which are being conveyed to the Consolidated Rail Corporation (ConRail) under the Final System Plan issued by the United States Railway Association in accordance with the Regional Rail Reorganization Act of 1973, as amended.

The records indicate that you are presently on an authorized leave of absence, or absent because of disability.

This is to advise that your employment relationship, including seniority, will be automatically transferred to ConRail as of the date of conveyance, unless you accept an offer of employment with an acquiring railroad or do not desire to establish an employment relationship with ConRail and so advise, in writing, Mr. A. E. Egbers, Vice President-Labor Relations, 1818 Market Street, Fifteenth Floor, Philadelphia, Pennsylvania 19103.

Very truly yours,

Richard D. Spence
President and Chief
Operating Officer

Form Title V-4

Form Approved, Budget Bureau No. 42-R010

I. C. C. WAGE STATISTICS Form B

MONTHLY REPORT OF EMPLOYEES, SERVICE, AND COMPENSATION—Continued

Full name of reporting company CONRAIL

Month of APRIL, 19 26
For calendar year ____, 19__
(Blanks Are Void)

Schedule No.	Reporting Division	Number on Subsistence Books at Close of Month	Number of Employees Who Served Part Time During the Month	Service Hours: Employees Paid Actual Service	Service Hours: Employees Paid Pay	Service Hours: Overtime Paid For	Service Hours: Compensated Absences, Allowances and Vacations and Holidays	Service Hours: Total	Line No.
	(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	
	VI (b). TRANSPORTATION (YARD AND SERVICE)								
101	Road passenger conductors	793	835	103 359	121 384	19 810	33 376	224 570	101
102	Assistant road passenger conductors and ticket collectors	1 056	1 202	119 748	221 029	31 730	38 547	291 306	102
103	Road freight conductors (through freight)	1 577	1 699	239 165	349 148	19 486	136 186	495 820	103
104	Road freight conductors (local and way freight)	928	934	151 055	172 225	35 873	34 471	244 569	104
105	Road passenger baggagemen	87	88	10 555	17 694	1 220	1 985	30 949	105
106	Road passenger brakemen and flagmen	254	265	32 062	48 654	4 194	9 990	62 838	106
107	Road freight brakemen and flagmen (through freight)	3 519	3 947	469 965	669 310	38 000	263 266	970 576	107
108	Road freight brakemen and flagmen (local and way freight)	1 904	1 920	294 727	336 478	69 654	64 461	470 593	108
109	Yard conductors and yard foremen	3 575	3 686	541 616	551 721	75 809	110 298	737 819	109
110	Yard brakemen and yard helpers	6 858	7 347	949 681	966 362	141 488	168 222	1 276 072	110
111	Road passenger engineers and motormen	855	887	110 287	188 931	26 378	27 350	342 659	111
112	Road freight engineers and motormen (through freight)	1 857	2 047	277 793	387 001	25 749	147 029	561 779	112
113	Road freight engineers and motormen (local and way freight)	989	991	145 928	162 352	36 135	41 554	240 041	113
114	Yard engineers and motormen	3 080	3 310	486 241	493 954	72 397	99 747	666 098	114
115	Road passenger firemen and helpers	425	477	49 253	82 106	9 614	13 495	104 375	115
116	Road freight firemen and helpers (through freight)	1 143	1 179	132 432	193 734	10 741	49 408	274 083	116
117	Road freight firemen and helpers (local and way freight)	533	544	71 698	80 316	17 250	19 898	117 964	117
118	Yard firemen and helpers	1 442	1 514	205 434	208 911	32 042	36 115	277 068	118
(100)	Total (transportation—train and engine)	30 895	32 822	4 390 699	5 294 340	667 611	1 316 598	7 228 519	(100)
(102)	TOTAL, ALL GROUPS (Divisions 901 - 908)	94 487	100 429						(102)

Schedule No.	Reporting Division	Compensation*: Employees Paid Pay	Compensation*: Overtime Paid For	Compensation*: Compensated Absences, Allowances and Vacations and Holidays	Compensation*: Total	Miles: Revenue Road	Miles: Road not own and Rent	Train Miles of Trains not Wholly Over Line Yard, Switching Lines or Road	Line No.
		(i)	(j)	(k)	(l)	(m)	(n)	(o)	
	VI (b). TRANSPORTATION (YARD AND SERVICE)—Continued								
101	Road passenger conductors	1 117 635	126 336	214 936	1 458 907	2 726 774	505 614	18 880	101
102	Assistant road passenger conductors and ticket collectors	1 273 823	179 847	221 569	1 675 249	3 442 442	800 233	24 013	102
103	Road freight conductors (through freight)	2 036 657	183 042	818 309	3 038 008	4 001 014	268 349	29 993	103
104	Road freight conductors (local and way freight)	1 094 802	35 031	232 890	1 680 723	1 652 139	504 828	19 073	104
105	Road passenger baggagemen	167 766	7 012	11 164	125 942	323 270	18 487	1 276	105
106	Road passenger brakemen and flagmen	315 633	31 523	62 301	409 507	743 096	96 735	5 932	106
107	Road freight brakemen and flagmen (through freight)	3 631 518	314 491	1 431 813	5 389 822	7 913 732	489 452	58 565	107
108	Road freight brakemen and flagmen (local and way freight)	1 955 506	628 012	374 999	2 958 517	3 258 875	945 139	37 060	108
109	Yard conductors and yard foremen	4 009 533	822 225	792 126	5 623 884	• • •	• • •	69 105	109
110	Yard brakemen and yard helpers	6 580 048	1 437 236	1 132 131	9 149 415	• • •	• • •	121 697	110
111	Road passenger engineers and motormen	1 376 792	168 111	194 843	1 733 746	2 715 558	134 015	19 534	111
112	Road freight engineers and motormen (through freight)	2 793 037	283 311	1 054 356	4 130 704	4 517 807	377 612	36 409	112
113	Road freight engineers and motormen (local and way freight)	1 186 227	347 472	302 482	1 836 186	1 489 156	565 186	18 742	113
114	Yard engineers and motormen	3 902 695	854 253	782 226	5 539 173	• • •	• • •	63 120	114
115	Road passenger firemen and helpers	601 718	58 738	91 044	751 500	1 330 665	51 086	9 115	115
116	Road freight firemen and helpers (through freight)	1 681 111	96 687	428 517	1 706 315	2 234 993	158 502	12 157	116
117	Road freight firemen and helpers (local and way freight)	502 231	161 005	124 820	788 056	738 924	272 297	9 407	117
118	Yard firemen and helpers	1 484 359	249 451	239 612	1 973 422	• • •	• • •	25 283	118
(100)	Total (transportation—train and engine)	33 943 151	6 433 787	8 509 138	49 988 016	37 091 250	5 211 987	585 861	(100)

*The corresponding figures in this report include employees' contributions, but exclude taxes paid by the railroad for old age retirement and unemployment insurance.

Speed basis for computing pay on respondent's road: Passenger 20 M P H; Freight 12 M P H

I. C. C. WAGE STATISTICS Form B

MONTHLY REPORT OF EMPLOYEES, SERVICE, AND COMPENSATION—Continued

Full name of reporting company Consolidated Rail Corp.

Month of _____, 19__
For calendar year Annual, 1982

Occupation No.	Reporting Divisions	Hours on Duty Service Hours or Miles	Hours on Duty Not Service But Chargeable Time (Explain Briefly) (See Instructions)	Service Hours: Straight Time Actually Worked	Service Hours: Straight Time Paid For	Service Hours: Overtime Paid For	Service Hours: Constructive Allowances, Lieu Time and Vacations and Holidays	Service Hours: Total	Base Hourly Rate
	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	
	VI (b). Transportation (train and engine)								
111	Road passenger conductors	815	843	1 240 690	2 074 041	234 888	548 463	2 855 192	111
112	Assistant road passenger conductors and ticket collectors	1 219	1 266	1 589 192	2 914 489	369 259	731 241	4 014 989	112
113	Road freight conductors (through freight)	1 389	1 433	2 127 436	3 434 719	198 710	1 325 776	4 809 204	113
114	Road freight conductors (local and way freight)	895	902	1 586 994	1 835 707	346 871	652 379	2 835 352	114
115	Road passenger baggagemen	90	92	141 162	224 937	15 369	56 000	296 306	115
116	Road passenger brakemen and flagmen	149	154	206 016	335 944	31 312	127 143	494 999	116
117	Road freight brakemen and flagmen (through freight)	2 898	3 135	4 143 232	6 204 746	338 593	2 590 083	9 133 422	117
118	Road freight brakemen and flagmen (local and way freight)	1 821	1 859	2 935 501	3 421 733	675 359	1 128 923	5 230 615	118
119	Yard conductors and yard foremen	2 533	2 556	4 340 145	4 358 466	428 479	1 034 486	5 821 431	119
120	Yard brakemen and yard helpers	4 355	4 428	6 876 734	6 897 407	707 449	1 544 330	9 149 186	120
121	Road passenger engineers and motormen	848	878	1 338 491	2 284 041	304 329	419 324	3 008 194	121
122	Road freight engineers and motormen (through freight)	1 588	1 652	2 463 344	3 612 797	238 291	1 372 598	5 223 688	122
123	Road freight engineers and motormen (local and way freight)	701	755	1 319 261	1 527 488	312 182	532 903	2 371 823	123
124	Yard engineers and motormen	2 307	2 340	4 001 423	4 042 561	480 818	959 719	5 483 104	124
125	Road passenger firemen and helpers	400	436	577 446	773 938	88 968	133 629	1 196 615	125
126	Road freight firemen and helpers (through freight)	868	941	1 249 742	1 945 410	91 339	499 238	2 636 487	126
127	Road freight firemen and helpers (local and way freight)	383	394	662 249	777 378	139 097	235 556	1 152 631	127
128	Yard firemen and helpers	1 066	1 094	1 784 788	1 797 366	188 406	346 965	2 333 725	128
(009)	Totals (transportation—train and engine)	24 366	25 142	38 452 616	48 441 336	5 218 801	14 314 415	68 004 529	(009)
(010)	TOTAL, ALL GROUPS (Divisions 001 - 005)	78 636	81 182						(010)

Occupation No.	Reporting Divisions	Compensation: Straight Time Paid For	Compensation: Overtime Paid For	Compensation: Constructive Allowances, Lieu Time and Vacations and Holidays	Compensation: Total	Miles: Actually Run	Miles: Paid for but not Run	Miles: Total Number of Trips Over Which Miles Taken, Trips + Miscellaneous But Not Paid	Base Hourly Rate
		(9)	(10)	(11)	(12)	(13)	(14)	(15)	
	VI (b). Transportation (train and engine)—Continued								
111	Road passenger conductors	19 556 790	2 181 632	5 100 225	26 837 647	33 622 189	5 538 444	246 239	111
112	Assistant road passenger conductors and ticket collectors	26 614 562	3 206 790	6 327 554	35 148 906	46 529 464	9 455 095	320 665	112
113	Road freight conductors (through freight)	29 751 349	3 743 376	12 138 874	44 613 599	36 509 919	3 661 619	488 284	113
114	Road freight conductors (local and way freight)	18 128 299	2 292 133	6 150 017	26 570 449	15 129 224	7 783 534	203 467	114
115	Road passenger baggagemen	1 921 181	156 963	443 991	2 521 135	4 017 212	648 728	23 404	115
116	Road passenger brakemen and flagmen	2 871 721	206 434	1 067 121	4 135 466	5 273 228	846 047	38 054	116
117	Road freight brakemen and flagmen (through freight)	54 228 707	4 296 281	21 035 501	79 610 489	71 600 521	5 491 305	543 084	117
118	Road freight brakemen and flagmen (local and way freight)	32 335 468	3 178 456	9 923 556	51 437 480	28 976 709	13 902 642	380 209	118
119	Yard conductors and yard foremen	47 204 858	6 571 346	10 691 976	64 468 180	• • • • • • •	• • • • • • •	556 716	119
120	Yard brakemen and yard helpers	72 361 632	10 274 689	15 095 449	97 731 760	• • • • • • •	• • • • • • •	881 775	120
121	Road passenger engineers and motormen	24 141 143	2 503 992	4 550 184	31 395 319	32 126 779	1 342 966	220 447	121
122	Road freight engineers and motormen (through freight)	37 649 022	3 696 767	13 930 676	55 276 563	39 854 476	4 976 345	337 520	122
123	Road freight engineers and motormen (local and way freight)	16 437 259	4 862 067	5 508 914	26 808 242	12 756 911	6 374 457	174 812	123
124	Yard engineers and motormen	46 562 515	7 939 805	10 604 199	65 106 519	• • • • • • •	• • • • • • •	517 233	124
125	Road passenger firemen and helpers	10 338 394	738 538	1 427 830	12 504 762	14 483 506	348 013	94 461	125
126	Road freight firemen and helpers (through freight)	18 519 677	1 234 022	4 309 731	24 063 930	21 700 761	2 422 228	171 669	126
127	Road freight firemen and helpers (local and way freight)	7 632 008	1 088 491	2 136 332	11 667 791	6 833 733	2 396 094	87 640	127
128	Yard firemen and helpers	18 743 661	2 702 829	3 818 806	25 265 296	• • • • • • •	• • • • • • •	196 672	128
(009)	Totals (transportation—train and engine)	479 917 170	70 010 955	134 720 336	684 648 461	376 412 632	64 743 923	6 077 746	(009)

Speed basis for computing pay on respondent's road: Passenger 20 MPH; Freight 12 1/2 MPH

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2943

THOMAS LE STRANGE,
Appellant

v.

CONSOLIDATED RAIL CORPORATION,
Appellee

Appeal from the United States District Court for the Middle District of Pennsylvania

(D.C. No. 78-0944)

Submitted June 8, 1982

Before: ADAMS and WEIS, *Circuit Judges* and BLOCH*, *District Judge*

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* The Honorable Alan Bloch, United States District Judge for the Western District of Pennsylvania, sitting by designation.

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

BLOCH, *District Judge*.

Plaintiff brought suit, pursuant to §504 of the Rehabilitation Act of 1973, claiming he was denied employment by the defendant because he is handicapped. Sec-

tion 504, 29 U.S.C. §794, provides: "No otherwise qualified handicapped individual . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." Although the lower court dismissed plaintiff's action because he lacked standing to bring his suit, we think the question posed by this appeal is, in fact, whether §504's prohibition against discrimination by federal grantees encompasses a ban against employment discrimination.

I

The lower court concluded plaintiff did not have standing to sue defendant for employment discrimination "unless 1) providing emplovment is a primary objective of the federal aid received by the defendant, or 2) discrimination in employment necessarily causes discrimination against primary beneficiaries of the federal aid." *LeStrange v. Consolidated Rail Corp.*, No. 78-0944 (M.D. Pa. Oct. 20, 1981). The court further refined the first prong of its standing test to require the plaintiff to show he is a primary beneficiary of the federal aid received by the defendant, and that the primary objective of the federal aid be to create new jobs, and not merely to maintain employment or to compensate for lost jobs. Plaintiff could not meet either of the two prongs of the lower court's standing test.

This standing test had its genesis in the case of *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978). The *Trageser* analysis has since been adopted by the Eight Circuit in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (1980), the Second Circuit in *United States v. Cabrini Medical Center*, 639 F.2d 908 (1981), and the Ninth Circuit in *Scanlon v. Atascadero State Hospital*, No. 80-5201 (May 24, 1982). *Trageser* and its progeny rely on §505(a)(2) of the Reha-

bilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, amending the Rehabilitation Act of 1973, which provides:

> "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such. . . ."

29 U.S.C. §794a(a)(2).

Title VI served as the model for §504 of the Rehabilitation Act. Section 601 of Title VI provides:

> "No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

42 U.S.C. §2000d.

Section 602 of Title VI authorizes federal departments and agencies to promulgate regulations to enforce §601's prohibition against discrimination, including regulations providing for the termination of federal funding in the event of non-compliance, *id.*, §2000d-1. However, §604 provides:

> "Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment."

Id., §2000d-3.

Trageser concludes, first, that §604 limits not only agency action, but also the actions of private litigants. It then concludes that the remedies, procedures and rights of Title VI extended to the victims of handicap discrimination by the 1978 amendments to the Rehabilitation

Act includes §604's limitation on the right to bring an action for employment discrimination.

The lower court reformulated the *Trageser* holding into a test for standing, peculiar to §504 actions. We see no reason to formulate any test for standing for §504 actions other than that promulgated by the Supreme Court for general application, that is (a) does the plaintiff allege "that the challenged action has caused him injury in fact, economic or otherwise"; and (b) "[is] the interest sought to be protected by the complainant . . . arguably within the zone of interest [sought] to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 152-53 (1970). The relevant question on this appeal would then be whether plaintiff's interest in being free from employment discrimination falls within the zone of interests sought to be protected by §504. However, the correct formulation of the test for standing for §504 actions is not the crucial issue presented by this appeal. For however the test is formulated, the crucial issue is whether §504, as amended in 1978, covers employment discrimination against the handicapped by federal grantees.

II

The Supreme Court recently confronted this same issue within the context of Title IX of the Education Amendments of 1972, and we believe its approach in *North Haven Board of Education v. Bell*, 50 U.S.L.W. 4501 (May 17, 1982), dictates our approach in this case.

Section 901(a) of Title IX, like §504 of the Rehabilitation Act, is modeled after §601 of Title VI of the Civil Rights Act. It provides:

> "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any

education program or activity receiving Federal financial assistance. . . ."

The Department of Education promulgated regulations pursuant to Title IX, prohibiting federally funded education programs from discriminating in employment on the basis of gender. Two Connecticut public school boards brought separate suits challenging its authority to issue the regulations, arguing Title IX was not meant to reach the employment practices of educational institutions.

The Supreme Court began its analysis by focusing on the statutory language, concluding first that "[A] female employee who works in a federally funded education program is 'subjected to discrimination under' that program if she is paid a lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are her male colleagues," *id.*, at 4503, and, therefore, that, "Because §901(a) neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary," *id.* To determine whether "other considerations counsel to the contrary," the Supreme Court looked to the legislative history "for evidence as to whether Congress meant somehow to limit the expansive language of §901," *id.* The Court found no such evidence and held, "Title IX proscribes employment discrimination in federally funded education programs," *id.* at 4507.

III

The statutory language of §504 of the Rehabilitation Act and §901 of Title IX being virtually identical, we are bound to conclude, like the Supreme Court in *North Haven*, that because §504 "neither expressly nor impliedly

excludes employees from its reach, we should interpret the provisions as covering and protecting these 'persons' unless other considerations counsel to the contrary." For like female employees, handicapped employees are "subjected to discrimination under" a federally funded program if they are paid lower salaries, given less opportunity for promotion, or forced to work under more adverse conditions than are their non-handicapped colleagues. Similarly, a handicapped individual is certainly "subjected to discrimination under" a federally funded program if, as alleged in our case, he is not hired at all, solely because of his handicap.

Of course, *Trageser* and the courts which have followed it, including the lower court in this case, find counsel to the contrary in §505(a)(2) of the 1978 amendments to the Rehabilitation Act, extending the remedies, procedures and rights of Title VI to victims of handicap discrimination. Title IX contains no provision similar to §505(a)(2). *Trageser* would also argue that §505(a)(2) should be read together with §505(a)(1), 29 U.S.C. §794a(a)(1), extending the remedies, procedures and rights of Title VII to victims of handicap discrimination by the federal government. The failure of Congress to extend Title VII to victims of discrimination by federal grantees indicates to the *Trageser* court its intention to limit the scope of §504 to discrimination other than employment discrimination. We do not believe that the statutory language of §505(a)(2), even when read in the context of §505(a)(1), indicates a desire to narrow the scope of §504. For this reason, we would nonetheless find §504 prohibits employment discrimination by federal grantees unless anything in the legislative history of either §504 or §505(a)(2) counsels to the contrary.

Section 505(a)(2) extends the remedies, rights and procedures of Title VI to (1) persons; (2) aggrieved by any act or failure to act by either a recipient or a provider of federal funds. Title VI consists of six provisions,[1] and

1. The first provision of Title VI, §601, 42 U.S.C. §2000-d, is the declaration prohibiting discrimination on the basis of race, color or national origin by federal grantees. The second provision, §602,

the only one which extends to *persons* any rights or remedies is §603, 42 U.S.C. §2000d-2, providing for judicial review of agency action.

The plain words of §604 limit its application to departments or agencies. Given the statutory scheme of which Title VI is a part, it is not illogical to assume Congress intended precisely what it said and no more. Title VI is, of course, a part of the 1964 Civil Rights Act. The 1964 Civil Rights Act also has a Title VII which deals exclusively with employment discrimination. In 1964, it prohibited employment discrimination on the basis of race, color or national origin by *any* employer with 15 or more employees working each working day for at least 20 weeks. Obviously, the sweep of Title VII is far broader than Title VI. Clearly, Title VI was never meant to be a prime tool for the enforcement of employment rights.

Title VII created a new federal agency, the Equal Employment Opportunity Commission, to battle employment discrimination. Without the limiting language of §604, Title VI threatened to engage every other department and agency in the same battle, with the potential danger of varying rules, regulations and strategies.

The question of whether §604 also limited the rights of private litigants was unlikely to even occur to the Congress. The only reason for a private litigant to sue for employment discrimination under Title VI is that

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id. §2000d-1, authorizes federal departments and agencies to issue rules, regulations and orders to effectuate the initial prohibition against discrimination. Section 602 also provides that compliance with the regulations may be effected by the termination of federal funding. It further provides for a number of procedures clearly designed, not to protect the victim of discrimination, but the federal grantee. Section 603, *id.* §2000d-2, provides for judicial review of agency action. Section 604, *id.* §2000d-3, prohibits any department or agency from terminating funds for employment discrimination unless a primary goal of the federal program involved is to provide employment. Section 605, *id.* §2000d-4, exempts from the scope of Title VI programs which receive federal financial assistance by way of a contract of insurance or guaranty.

he failed to meet the administrative requirements to bringing suit under Title VII. Even then, an action brought pursuant 42 U.S.C. §1983 may provide a wider range of remedies than a Title VI action.[2]

As to the implications raised by §505(a)(1), extending the remedies, procedures and rights of Title VII to victims of discrimination by the federal government, closer analysis undermines the *Trageser* argument that this too indicates Congressional intent to limit §504 to discrimination other than employment discrimination.

Section 505(a)(1) extends particular provisions of Title VII to individuals aggrieved by the final disposition of a complaint brought pursuant to §501 of the Rehabilitation Act. Section 501 requires federal departments, agencies and instrumentalities, including the Postal Service, to develop an affirmative action plan for the hiring, placement and advancement of handicapped individuals. Handicapped employees or prospective employees aggrieved by agency action or inaction may file a complaint with the agency. The particular provisions of Title VII referred to in §505(a)(1) extend to complaining individuals the right to appeal an adverse agency decision to the EEOC and then to bring a civil action in court. The various provisions prescribe various time limitations on agency action and the filing of appeals and civil suits. They further proscribe various court procedures.

Section 505(a)(1) refers alleged victims of employment discrimination on the basis of handicap in the federal government to the very sections of Title VII dealing with employment discrimination on the basis of race, color, religion, sex or national origin in the federal government. Section 505(a)(1) asks the EEOC to do what it

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2. Some courts have decided that a Title VI litigant is entitled to declaratory and injunctive relief only, and not monetary damages. *Drayden v. Needville Independent School Dist.*, 642 F.2d 129 (5th Cir. 1981); *Concerned Tenants Ass'n. v. Indian Trails Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980).

is already doing for victims of employment discrimination on one basis for victims of employment discrimination on another basis. The question before the EEOC in either case is the same: was this person discriminated against in the making of some employment decision? Once the EEOC has made its determination, the alleged discriminatee, if dissatisfied, may go to court.

In contrast, extending Title VII rights, remedies and procedures to victims of discrimination by federal grantees would present a host of new issues to the EEOC. First, it would take it beyond the realm of employment discrimination for the first time, to discrimination in housing, access, education, etc. Second, it would ask it to resolve the issue of what is a federally-funded program or activity, a question with which it has no familiarity.

The failure of Congress to extend Title VII to victims of §504 discrimination was obviously intended simply to short-circuit the EEOC, and for obvious reasons. Reading into the statutory framework of §505 an intention to drastically narrow the scope of §504 is a strained interpretation of an otherwise reasonably constructed provision. Support should be found in the legislative history before we should stretch so far.

IV

In order to be certain that Congress intended what the broad sweep of its language in §504 indicates, we must undertake a two-step analysis of legislative history. Section 504 should be read to prohibit employment discrimination "unless other considerations counsel to the contrary." Considerations counselling to the contrary may be found in the legislative history of §504 of the Rehabilitation Act of 1973 or the legislative history of the 1978 amendments, which introduced §505(a)(2) to the Act. We begin with the 1973 legislative history. Because we believe nothing in that history indicates Congress in-

tended anything less than it said, we then turn to the history of the 1978 amendments to determine if Congress, at that point, intended to narrow the scope of its prior enactment.

A

The legislation which would eventually become the Rehabilitation Act of 1973 was considered and passed by the Congress three times before it was finally signed into law by President Nixon on September 26, 1973. Sen. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted* in 1973 U.S. Code Cong. & Ad. News 2076, 2086-2090 [hereinafter cited at Sen. Rep. No. 93-318]. A provision prohibiting discrimination against the handicapped by federal grantees was part of all three measures, *id.* at 2078-2082, although it was not part of the original resolution passed in 1972 by the House. Comm. of Conf. Rep. H.R. 8395, 92d Cong., 2d Sess. *reprinted in* 118 Cong. Rec. 35141, 35163.

All versions of the legislation were lengthy, the first two even lengthier than the third. Certainly, the primary purpose of the legislation was to extend the 53-year-old vocational rehabilitation program, for another period of years, with a new mandate, in the original two bills, to give priority to the severly handicapped. In addition, the bills as originally submitted to the President authorized a program which, for the first time, would have provided rehabilitation services to severly handicapped individuals with no feasible vocational goals. In addition, the original two bills would have created a series of other new programs concentrating on particular sub-groups of the handicapped, such as older deaf and blind individuals with spinal cord injuries and individuals with end-stage renal disease. Finally, the bills would have mandated certain research and created a number of federal bodies to deal with particular problems of the handicapped. Sen. Rep. No. 93-318, 1973 U.S. Code Cong. & Ad. News at 2078-2079.

The first bill was pocket vetoed by the President on October 27, 1972. 118 Cong. Rec. 37203. The second bill was vetoed on March 27, 1973, 119 Cong. Rec. 9307, and the Senate failed to override the veto a week later, *id.* at 10794. Serious negotiations between the Administration and, primarily, the Senate then began. Sen. Rep. No. 93-318, 1973 U.S. Code & Ad. News at 2082. [sic].

The President's primary objection to the original two bills was that they authorized what he considered to be an excessive and inflationary amount of money to fund the proposed programs. He also objected to what he saw as a change of focus in the highly successful vocational rehabilitation program by requiring priority be given to the severely handicapped. He also opposed the proliferation of categorical grants to fund the new programs and the proliferation of federal commissions, councils and divisions. 118 Cong. Rec. 5880 (first veto memorandum); 119 Cong. Rec. 24570 (second veto memorandum). The final bill that was to become law was trimmed from seven titles to five. It required only that vocational rehabilitation programs give equal, not priority, treatment to the severely handicapped, eliminated all the proposed new programs, including the non-vocational rehabilitation program, eliminated most of the new federal bodies which would have dealt with the problems of the handicapped, and, of course, significantly lowered the amount of money authorized to fund the remaining legislation. Sen. Rep. No. 93-318, 1973 U.S. Code Cong. & Ad. News at 2079-2082.

At no time was there any dispute between the Administration and the Congress over the wisdom of the non-discrimination provision which would eventually be codified in §504. Neither was it ever a matter of controversy between the Senate and the House. Although it was not part of the first House resolution, the Senate version was accepted in conference with no more than the notation, "The House recedes." 118 Cong. Rec. 35163.

It is not surprising, therefore, that despite the pages of legislative history generated by an act debated and passed three times by Congress, that there is little reference to §504. There is no direct reference indicating that §504 was not meant to cover employment discrimination. However, there are several both direct and indirect references indicating the contrary.

The Rehabilitation Act was born in the Senate in the newly constituted Subcommittee on the Handicapped of the Committee on Labor and Public Welfare. The subcommittee was charged with examining *all* issues related to the handicapped, not just those raised by the vocational rehabilitation program. 119 Cong. Rec. 5882. The expanded focus of the bill which was reported by the subcommittee was certainly due, in part, to the wide focus of the subcommittee's mandate. The legislative history indicates one of the problems of the handicapped addressed by the subcommittee was the problem of employment discrimination.

Senator Cranston, who chaired the subcommittee for the purpose of considering the legislation extending the vocational rehabilitation program, commented during debate on various criticisms of the program which he felt could not be handled simply by amending the Vocational Rehabilitation Act itself. "Such problems, as *unfounded discrimination in employment* in housing, difficulties of access to places of work and treatment centers, and duplication and fragmentation of services across program lines were voiced repeatedly to the committee," he noted. (Emphasis added). *Id.* [3]

Discrimination in employment has a particularly detrimental impact on the vocational rehabilitation program, Senator Cranston noted:

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3. *See also*, the remarks of Senator Stafford, the ranking minority member of the subcommittee, 119 Cong. Rec. 5893; and Sen. Rep. No. 93-318, 93d Cong. 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2078.

> "[D]iscrimination in placement, hiring and advancement continue to limit the vocational rehabilitation program's ability to effect successful rehabilitations . . . The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to eliminate architectural barriers and provide substantial accomplishments in employment for handicapped individuals."

Id.

These sentiments of Senator Cranston expressed during debate on the second incarnation of the act were echoed by Senator Taft during debate on the third incarnation of the act:

> The basic purpose of vocational rehabilitation continues to be to help physically and mentally handicapped individuals achieve the ability to work, earn, and live independently in their communities. Yet in spite of the relatively high success of this program, we still have a long way to go . . . Too many handicapped Americans are not served at all, too many lack jobs, and too many are underemployed — utilized in capacities well below the levels of their training, education, and ability.
>
> However, if we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all — discrimination.

Id. at 24587.

And, clearly, the Rehabilitation Act addressed the problem of employment discrimination. As described by Senator Javits, co-sponsor of the act, a member of the subcommittee and ranking minority member of the parent Committee on Labor and Public Welfare, "This

measure draws upon the experience of the past half century and provides new emphasis on the severely handicapped, the homebound, client services and participation, *opportunities for employment of the handicapped* and administration improvements." (Emphasis added). *Id.* at 5887. The bill as originally reported and ultimately enacted into law provided, in sections immediately preceding §504, for affirmative action programs to encourage the hiring of the handicapped by the federal government, 29 U.S.C. §791(b) and federal contractors, 29 U.S.C. §793. It is hard to imagine, in an Act whose primary goal is to enhance the vocational capabilities of the handicapped, that if the legislature had intended to limit the reach of a provision which immediately follows two sections whose express purpose is to encourage the hiring of the handicapped, that someone somewhere in the legislative history would not have said so. On the contrary, several members indicated the opposite.

During debate on the original bill, Senator Javits highlighted several new areas of federal responsibility recognized by the legislation: "I refer, for example, to . . . provisions for encouraging hiring of the handicapped under Federal contracts and Federal grants." 118 Cong. Rec. 32305. Senator Humphrey reviewed those provisions requiring affirmative action by federal contractors and prohibiting discrimination by federal grantees and found they embodied the intent of bills he had introduced earlier which would have amended both Titles VI and VII of the 1964 Civil Rights Act to include the handicapped. *Id.* at 32310. Finally, Senator Williams, chairman of the full Committee on Labor and Public Welfare, during debate on the third version of the bill, reviewed provisions retained from the first two versions, including, "prohibitions against discrimination in employment in programs assisted with Federal funds." 119 Cong. Rec. 24588.

These few direct references to §504 support the conclusion that the intent of Congress matched the

broad sweep of its language. We turn now to the question of whether Congress intended to narrow the scope of §504 by the 1978 amendments, specifically §505(a)(2).

B

Section 505(a)(2) originated in the Senate and was adopted by the Committee of Conference assigned to reconcile the Senate and House versions of the 1978 amendments to the Rehabilitation Act. House Conf. Rep. No. 95-1780, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7375, 7404. Although the Joint Explanatory Statement of the Committee of Conference offers no assistance in interpreting the provision, noting only that the House receded in its opposition to §505(a)(2), *id.*, the report of the Senate Committee on Human Resources accompanying the original Senate bill discusses the purpose of the provision.

The Senate Committee notes that the then Department of Health, Education and Welfare had recently issued regulations enforcing the prohibition against handicap discrimination by federal grantees embodied in §504. These regulations are particularly noteworthy because HEW was assigned the task, by executive order, of coordinating the issuance of regulations enforcing §504 by all federal departments and agencies. These regulations, subsequently codified at 45 C.F.R. §84.1 *et seq.*, prohibited discrimination in employment practices, *id.* at §84.11. Nonetheless, the Committee stated:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. *Thus, this amendment codifies existing practice as a specific statutory requirement.*

Sen. Rep. No. 95-890, 95th Cong. 2d Sess., p. 19. (Emphasis added).

The committee further stated that applying the provisions of Title VI to §504 of the Rehabilitation Act would assure "administrative due process, and provide for administrative consistency within the Federal Government." *Id.*

The committee report contains nothing that would indicate it felt HEW exceeded its statutory authority by prohibiting employment discrimination in its recently promulgated regulations. Similarly, no one during the debate in the Senate or House suggested HEW had gone too far. In fact, the only Congressman who directly mentioned the regulations during debate, Representative Dodd, "strongly supported the long-delayed issuance of the section 504 regulations believing then, as now, that the protections they establish for the handicapped are very much needed." 124 Cong. Rec. 13905.

Several proposed amendments to the act, and the debate on them, further indicate that Congress understood §504 to reach employment discrimination, when enacted and as amended. For example, Senator Cannon proposed during debate an amendment which, for the purpose of §503 and §504 of the Rehabilitation Act, would exclude from the definition of handicapped individual an alcoholic or drug abuser "whose condition of alcoholism or drug abuse renders that individual not qualified for employment . . ." The purpose of Senator Cannon's amendment, which was eventually passed and codified at 29 U.S.C. §707(7)(A), was: "To exclude alcoholics and drug abusers from certain employment provisions of the Rehabilitation Act . . ." 124 Cong. Rec. 30322. Its scope was considerably narrower than a similar measure proposed in the House which would have excluded alcoholics and drug abusers from the definition of handicapped individuals altogether, regardless of whether their condition impacted on their employability or not.

Clearly, Senator Cannon believed §504 reached employment discrimination, and nobody during the debate on his argument suggested otherwise. More specifically, nobody suggested that if §504 had at one time reached employment discrimination, the proposed §505(a)(2) would have the effect of eliminating it from its scope. Senator Williams, chairman of the Committee on Human Resources, spoke in support of Senator Cannon's amendment, which he felt necessary "because of misunderstandings and distortions concerning employment rights of alcoholics and drug dependent persons." *Id.* at 30323. Senator Williams felt the amendment "would reassure employers that it is not the intent of Congress to require any employer to hire a person who is not qualified for the position or who cannot perform competently in his or her job." *Id.*

Senator Hathaway also spoke in support of the amendment because he felt it would protect those many alcoholics and drug addicts who hold jobs and perform them satisfactorily. "Sections 503 and 504 of the Rehabilitation Act protect such persons employed by agencies which receive Federal funds or employers which have Federal contracts from being fired solely because of their alcoholism or drug addiction." *Id.* at 30324.

Another amendment proposed during debate would have amended §505(a)(1) to limit a court in an action brought against the federal government to equitable and affirmative action remedies proportionate to actual damages.[4] 124 Cong. Rec. 30576. Its sponsor, Senator McClure, described the amendment's function as insuring "that mammoth affirmative action remedies involving

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4. A compromise was reached later in debate, which resulted in the following language being inserted in §505(a)(1): "In fashioning an equitable or affirmative action remedy . . . a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy." 29 U.S.C. §794a(a)(1).

substantial construction could not be compelled in instances in which actual damages were comparatively small." *Id.*

Senator McClure's amendment was vehemently opposed by Senator Cranston, a sponsor of the 1978 act, on the basis that the federal government should be required to do no less than private employers. Senator Cranston argued:

> The amendment offered by the Senator from Idaho would create an unwise and unrealistic distinction with respect to employment between the obligations of the Federal Government and the obligations of Federal contractors and grantees. Ironically, the Senator's amendment would limit — with a financial test — the Federal Government's obligation of being an equal opportunity employer. Federal contractors and grantees would — appropriately — continue to be required to be equal opportunity employers.

Id. at 30577-30578.

Finally, we would note the remarks of Representative Jefford, a member of the Subcommittee on Select Education, which reported the House version of the act, commenting on the creation of the Architectural and Transportation Barriers Compliance Board in §118 of the amendments:

> [W]e gave this board new and expanded responsibilities *for this one aspect of §504*. It is our thought that by separating only the "physical" barriers . . . from actual discrimination in *jobs*, education, housing, and health, we have taken a significant step forward.

Id. at 13901. (Emphasis added).

None of the above-quoted references to employment discrimination brought forth any objections from the speakers' colleagues in the House and Senate. In-

deed, they did not bring forth so much as a question or request for clarification.

Combining the legislative history looking for the intent of Congress is often a frustrating chore. Often the intent of Congress hinges on the remarks of one or two individuals. *See North Haven, supra* at 4504. Here our task has not been so difficult. Clearly, the legislative history to the 1978 amendments demonstrates a widespread understanding on the part of Congress that §504, even as amended, proscribed employment discrimination against the handicapped.

C

Post-enactment pronouncements provide confirmation of Congressional intent to cover employment discrimination in §504. The Senate Committee on Labor and Human Resources, whose predecessors reported both the 1973 Rehabilitation Act and its 1978 amendments, stated unequivocally one year after *Trageser, supra:*

> *[Trageser]* is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of, [section 504] regardless of the designated use of the Federal funds received by the employer in question.

In 1980, responsibility for coordinating enforcement of §504 by federal departments and agencies was transferred to the Attorney General. In his analysis of rules promulgated pursuant to this authority, the Attorney General took note of HEW's earlier regulations prohibiting employment discrimination,. *Trageser* and *Carmi,* the legislative history of both the 1973 Act and the 1978 amendments, and concluded, "[T]he Depart-

ment believes that the employment practices of recipients of Federal financial assistance are covered by section 504 regardless of the purpose of the assistance . . ." Nondiscrimination Based on Handicap in Federally Assisted Programs — Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914, 45 Fed. Reg. 37620, 37628 (1980).

V

Under the holding of the district court, Conrail is prohibited from discriminating against handicapped passengers, but is free to discriminate against the handicapped in employment. Such an analysis of §504, unless supported by the words of the relevant statutes or their legislative history, is absurd.

Thus far, the handicapped have not been extended the broad protections against discrimination extended women and members of other minority groups. Federal law protects the handicapped only if employed by the federal government, or federal contractors or grantees. To eliminate protection against discrimination in employment by federal grantees would eliminate a substantial portion of the small amount of protection afforded the handicapped. What is a commonsensicle approach to Title VI, thus, becomes a devastating blow within the context of the Rehabilitation Act. "In the context of §504 of the Rehabilitation Act, applied *Trageser*-style, §604 operates as a blunderbuss." *Scanlon, supra* at 2163 (Ferguson, J., dissenting). *See also, Carmi, supra* at 679 (McMillan, J., concurring). Neither the words of the statutes, nor legislative histories, dictate such a result.

For this reason, the order of the district court is reversed, and the case remanded for further consideration and ultimate disposition on the merits.

ADAMS, *Circuit Judge*, concurring in the judgment.

Had this appeal been presented for resolution several months ago, I might well have joined the other four courts of appeals in concluding that the Act was not intended to cover discrimination against the handicapped by private employers. After all, the statute makes no direct reference to private employment, and it certainly is not unreasonable to read the restrictions contained in section 604 of Title VI into the Rehabilitation Act.

Nonetheless, I have concluded that the result reached by the Court in this case is consonant with, and perhaps even compelled by, two recent decisions, one by the Supreme Court, *North Haven Board of Education v. Bell*, 50 U.S.L.W. 4501 (U.S. May 17, 1982), and the second by this Court, *Grove City College v. Bell*, No. 80-2383, slip op., (3d Cir. Aug. 12, 1982). And whatever I might think of the wisdom of these two decisions, I am bound to apply them unless they are overruled.

In *North Haven*,[1] *supra*, the Supreme Court concluded that the Department of Education had statutory authority to regulate employment discrimination in education — even though Title IX of the Education Act makes no direct reference to employment, and even though Title IX, which was patterned after Title VI, might be thought to incorporate the employment-regulation restrictions of section 604 of Title VI. Nevertheless, the Justices reasoned that the broad-sweeping language of Title IX, which did not explicitly rule out the regulation of employment discrimination, when coupled with a strong legislative and postenactment history, constituted a sufficient basis from which to infer a congressional intent to bring employees within the protection of Title IX. The *North Haven* analysis, when applied to the

1. *North Haven* involved claims of gender discrimination committed by two public school districts in Connecticut. The Supreme Court noted that one of those districts, North Haven, "devoted between 46.8% and 66.9% of its federal assistance to the salaries of its employees." 50 U.S.L.W. at 4502.

words of the Rehabilitation Act — which for all relevant purposes are identical to the words of Title IX — and when considered in connection within the strong legislative history of section 504, would appear to compel a similar conclusion. The theory and analysis underlying *North Haven*, then, would suggest that LeStrange prevail on this appeal.

In addition to *North Haven*, I am persuaded that it would be difficult to arrive at a contrary result in this matter after the recent opinion in *Grove City, supra*. In *Grove City*, also decided under Title IX of the Education Act, a panel of this Court concluded that an entire educational institution is brought within the definition of "program," and therefore subject to regulation under Title IX, if it receives any federal aid, and that aid is general or indirect and not specifically earmarked for a particular educational function within the institution. The logic of *Grove City* would appear to be irreconcilable with the analysis employed in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), where an employer was deemed to fall within the purview of the Rehabilitation Act only if federal funds were received specifically for employment purposes.

For these reasons I join the judgment of the Court in returning this matter to the district court for further proceedings.

WEIS, *Circuit Judge*, concurring.

I join in the judgment of the court because I believe the case on which the district court relied, *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979) was erroneously decided. I agree that the issue in this case is not one of standing, as that term is ordinarily used, *see, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State*, 50 U.S.L.W. 4103, 4105-06 (Jan. 12, 1982), but is the more direct question of the scope of §504.

Trageser held that the prohibition against handicap discrimination in §504 of the Rehabilitation Act is limited by the reference in §505(a)(2) to the provisions of Title VI of the Civil Rights Act of 1964. That is, a claim of employment discrimination against the handicapped is subject to §604 of Title VI: "Nothing contained in this subchapter shall be construed to authorize action . . . by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. §2000d-3.

Although it recognized that "§604 expressly curtails the authority of federal departments and agencies," the *Trageser* court concluded that "it also restricts private suits." 590 F.2d at 89. The court cited no authority for its conclusion and I am persuaded that it erred in applying §604 to private suits. The language of §604 confines its application to "action . . . by any department or agency" and does not refer at any point to suits brought by a private individual or entity.

The Rehabilitation Act's reference to Title VI was not intended to restrict the remedies of handicapped individuals but rather to limit the sanctions which government agencies could take against an offending recipient of federal financial assistance. Congress enacted §604 because it feared that when an employment violation occurred, an overzealous federal agency might threaten

the very existence of important programs by invoking the remedy of withholding funds.[1] The reference to Title VI in §505(a)(2) of the Rehabilitation Act must therefore be interpreted with the understanding that §604 was drafted to prevent administrative overkill. Viewed in this light, it is clear that the incorporation of §604 narrows not the rights of victims, but only the coercive measures which a "department or agency" can apply against an offender.

The dissenting opinion of Judge Ferguson in *Scanlon v. Atascadero State Hospital*, No. 80-5201 (9th Cir. May 24, 1982), analyzes the errors of the *Trageser* opinion at length. I agree with Judge Ferguson and see no need to repeat here the reasoning which underlies the conclusions we both reach. *See also, Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 676 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980), McMillian, J. (conc.).

It is worth noting that in *NAACP v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979), this court concluded that there is a private right of action under §504. Our holding today is wholly consistent with that case.

Of course, I intimate no views on the merits of this case and concur in the remand to the district court.

A True Copy:
Teste:
Clerk of the United States Court
of Appeals for the Third Circuit

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1. During congressional debates, Title VI was commonly referred to as the "cut-off-the-funds title." *See* Comment, *Employment Discrimination Against the Handicapped: Can Trageser Repeal the Private Right of Action*, 54 N.Y.U.L. Rev. 1173, 1186 n. 69.

FILED
JAN 17 1983
ALEXANDER L. STEVAS

No. 82-862

In the Supreme Court of the United States

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner

vs.

THOMAS LeSTRANGE,
Respondent

BRIEF OF RESPONDENT, THOMAS LeSTRANGE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of the Questions Presented and Parties to the Proceeding

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Does §504 prohibit employment discrimination on the basis of a handicap by federal grantees, regardless of the nature, purpose and intended beneficiaries of the federal financial assistance?

(Answered in the affirmative.)

2. Whether the prohibition against discrimination under §504 can be enforced by means of a private cause of action?

(Answered in the affirmative.)

PARTIES TO THE PROCEEDING

Respondent adopts the statement of the parties to the proceeding in petitioner's petition.

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CITATION OF THE OPINIONS BELOW

The text of the opinion and order of the United States District Court for the Middle District of Pennsylvania appears at the appendix of the Petition for Writ of Certiorari commencing at page A-25. The opinion of the Court of Appeals for the Third Circuit has been reported at 687 F.2d 767 (3d Cir. 1982) and the text of said opinion is set forth in the Petition for Writ of Certiorari commencing at page A-1. A prior opinion and order of the United States District Court for the Middle District of Pennsylvania was reported at 501 F. Supp. 964 (M.D. Pa. 1980). The text of that opinion is contained in the Petition for Writ of Certiorari at page A-53.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on September 1, 1982.

STATUTORY PROVISIONS INVOLVED

The text of the following statutes is set forth in petitioner's Petition for Writ of Certiorari at pages 2, 3 and 4:

1. 29 U.S.C. §794, as amended, Pub.L. 95-602, Title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987;

2. 29 U.S.C. §794a, Pub.L. 93-112, Title V, §505, as added Pub.L. 95-602, Title I, §120, Nov. 6, 1978, 92 Stat. 2982;

3. 42 U.S.C. §2000d, Pub.L. 88-352, Title VI, §601, July 2, 1964, 78 Stat. 252;

4. 42 U.S.C. §2000d-3, Pub.L. 88-352, Title VI, §604, July 2, 1964, 78 Stat. 253;

5. 20 U.S.C. §1681, Pub.L. 92-318, Title IX, §901, June 23, 1972, 86 Stat. 373.

COUNTER-STATEMENT OF THE CASE

The respondent, Thomas LeStrange (LeStrange), incorporates by reference the statement of the case made in the Petition for Writ of Certiorari filed by the petitioner, Consolidated Rail Corporation (ConRail). However, the respondent does not adopt the same as being an accurate representation of the facts in the case. Rather, the statement of the case previously filed should be read in conjunction with the following counter-statement of the case.

The original complaint in the case was filed on September 22, 1978 which was approximately one and one-half months prior to the amendments to §504. After a year of settlement negotiations and various tests which were conducted by the petitioner, an amended complaint was filed on October 26, 1979. The amended complaint, as well as the original complaint, indicated that ConRail had violated the Equal Protection Clause of the 14th Amendment to the Constitution of the United States, and 29 U.S.C. §794, commonly referred to as the "Rehabilitation Act of 1973" as amended, and seeking injunctive relief, compensatory damages, punitive damages and attorneys fees. On November 4, 1980, the District Court for the Middle District of Pennsylvania granted the defendant's motion to dismiss the plaintiff's claim based upon the Equal Protection Clause and the Civil Rights Act, but denied their motion to dismiss as to the claim of the Rehabilitation Act of 1973 (see: *LeStrange v. Consolidated Rail,* 501 F. Supp. 964 (M.D. Pa. 1980)).

Counter-Statement of the Case

The plaintiff had been employed by the Erie Lackawanna Railroad as a locomotive engineer. On March 17, 1971, the plaintiff underwent a partial amputation of his left forearm. One month later, on April 17, 1971, the plaintiff reported to work as an engineer with the Erie Lackawanna Railroad but was refused employment without the benefit of a medical evaluation or hearing. During 1973, the defendant became a successor in interest to the Erie Lackawanna Railroad pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-779 (Rail Act). From 1973 to April 4, 1978, the defendant refused to employ the plaintiff in any capacity and said refusal was made without allowing the plaintiff the benefit of a medical evaluation or a hearing on the matter. At all times, the plaintiff was ready, willing and able to work as an engineer. On April 4, 1978, ConRail authorized a medical examination for the plaintiff to determine his employability. This medical examination proved that the plaintiff was capable of performing his work as a railroad engineer. Thereafter, on May 2, 1978, the defendant, without a hearing, classfied the plaintiff as not qualified for the occupation of engineer.

On February 15, 1979, ConRail scheduled a field test for the plaintiff in order to determine whether the plaintiff could perform the duties of a yard engineer. This field test, which ConRail created, was prepared in such a manner so as to insure the plaintiff's failure due to his handicap. This test required the plaintiff to perform duties which were never performed by a yard engineer, under any circumstances. Notwithstanding this, the plaintiff was able to perform substantially all of these duties,

particularly those duties which are normally performed by a yard engineer.

A second revised field test was to be given to the plaintiff but he refused to take the same, upon advice of counsel, since the second test was also structured to insure the plaintiff's failure due to his handicap.

Shortly before the scheduled trial in this case, the petitioner filed a motion for summary judgment which was granted by Judge Sylvia Rambo. The decision of Judge Rambo was reversed in a decision by the Third Circuit Court of Appeals.

This matter is now before the Supreme Court of the United States on ConRail's Petition for a Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I. §504 Prohibits Employment Discrimination on the Basis of a Handicap by Federal Grantees, Regardless of the Nature, Purpose and Intended Beneficiaries of the Federal Financial Assistance

In its opinion, the Third Circuit Court of Appeals, upon reviewing the case law, statutory authority and legislative intent, concluded that §504, 29 U.S.C. §794, prohibits employment discrimination against handicapped individuals by any federal grantee regardless of the nature, purpose and intended beneficiaries of the federal financial assistance. The Court held that the limitations as set forth in the decisions of other Circuit Courts, were improper in light of the fact that it would create an absurd situation, where a federal grantee would be denied the right to discriminate against handicapped individuals in some respects, but could continue to discriminate against them in the area of employment.

The Third Circuit Court specifically disagreed with the following decisions:

1. *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979).

2. *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980).

3. *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981).

4. *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982).

This disagreement was premised upon a Supreme Court decision in *North Haven Board of Education v. Bell*, U.S. , 72 L.Ed. 2d 299 (1982).

When the Third Circuit relied on the *North Haven* decision, its reasoning was based upon two concepts. First, the restrictions for standing to bring an action under Title VI which were grafted upon §504 (see: §505 of the 1978 Amendments to the Rehabilitation Act, 29 U.S.C. §794(a) and §604, 42 U.S.C. §2000d-3) did not apply to a private cause of action. In reviewing the specific statutory language of Title VI and looking at the mechanism created under Title VII, the Court concluded that the restrictions of §604 applied only to agency action and did not apply to a private cause of action. The Court noted that this was to preclude expanded agency action in areas which Congress never intended to affect by Title VI.

The second concept relied upon by the Third Circuit in its reasoning was that if the Title VI restrictions did not apply to a private cause of action, then a private cause of action is specifically governed by the language of the Supreme Court in the *North Haven* decision cited above. The Court could find no basis for the *Trageser* line of reasoning which gratutiously grafted the Title VI restrictions upon a private cause of action. Because the language of §901 of Title IX in the *North Haven* decision was identical to the language contained in §504, the Third Circuit

Court properly concluded that the protection of §504 properly extends to employees since the language of the statute neither expressly nor impliedly excludes employees from its reach. The Court also noted that there were no other considerations which would permit a contrary interpretation.

In effect, the Third Circuit Court elevated employment discrimination against the handicapped to a level of all other types of discrimination against the handicapped. By examining the legislative intent of §504, the Third Circuit Court properly concluded that it was the intention of Congress to include employment discrimination with all other types of discrimination against the handicapped. If such is the case, there should be no special restrictions placed upon employment discrimination, where there are no special restrictions placed upon filing lawsuits based upon other types of discrimination. The Third Circuit Court noted that ConRail could not discriminate in accepting handicapped passengers since it receives federal funds and it is subject to §504. The Court then noted that it would be absurd to permit the same agency, receiving the same federal funds, to discriminate against handicapped employees. The Court could find no distinction between handicapped employees and handicapped passengers.

The Third Circuit Court also examined the post-enactment pronouncements of the Senate Committee on Labor and Human Resources. That pronouncement indicated that the Senate Committee was not satisfied with the *Trageser* decision and found that it was improper to limit the standing of handicapped employees.

Therefore, respondent believes that the Third Circuit Court properly relied upon the two foregoing concepts to conclude that the *Trageser* decision was improper. Even if the *Trageser* decision were to be upheld, the respondent believes that the funding of ConRail was sufficient to meet even the *Trageser* standards. Respondent believes that an examination of the Rail Act clearly indicates that ConRail receives the type of funding which would even meet the strict *Trageser* requirements.

Thus, based upon the foregoing, the Petition for Writ of Certiorari should be denied.

II. The Prohibitions Contained in §504 Can Be Enforced by Means of a Private Cause of Action

---

The Third Circuit Court properly held that the respondent, LeStrange, could protect his rights by use of a private cause of action brought under §504.

The Third Circuit Court was guided by its reasoning in *NAACP v. Wilmington Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979). The reasoning in this decision was proper and was consistent with the reasonings of this Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

In addition, this action was filed in September of 1978 about one and one-half months prior to the amendments to the statute in question. At the time that this action was filed, there was no procedure for filing an administrative action based upon handicap discrimination.

If this action was filed prior to the dates of the amendments, these amendments should not be applicable to this action. The only mechanism available at the time that this action was filed was a private cause of action. The respondent in this case should not be bound to ex post facto legislation.

Finally, assuming arguendo that a private cause of action does not exist under §504, this issue has been waived on appeal by the petitioner. The petitioner has been provided a number of opportunities to raise this issue in the case. A motion to dismiss was filed before Judge Nealon originally, and a motion for summary judgment was also filed before Judge Rambo. Further, an appeal was filed in the Third Circuit Court raising all of the issues of standing and the right to file a private cause of action. This issue has never been raised by the petitioner before this time and, as such, the petitioner has waived its right to raise the issue at this point.

Therefore, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

CONCLUSION

By virtue of the foregoing, the judgment of the Third Circuit Court should be affirmed and the Petition for Writ of Certiorari should be denied.

Respectfully submitted:

LENAHAN & DEMPSEY

By: JOSEPH P. LENAHAN

Attorneys for Respondent

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CERTIFICATION

I, Joseph P. Lenahan, Esq., hereby certify that I am admitted to the bar of the United States Supreme Court.

(s) JOSEPH P. LENAHAN

JOSEPH P. LENAHAN, ESQ.

CERTIFICATE OF SERVICE

Joseph P. Lenahan, Esq., hereby certifies that true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari will be supplied to the following individuals by Murrelle Printing Company, printers for the respondent, on or about January 17, 1983.

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Office-Supreme Court, U.S.
FILED
MAR 17 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-862

IN THE SUPREME COURT OF THE UNITED STATES

CONSOLIDATED RAIL CORPORATION, :
Petitioner :
:
VS. :
:
THOMAS LESTRANGE, :
Respondent

MOTION FOR SUBSTITUTION OF PARTIES
SUGGESTING DEATH OF THE RESPONDENT

1. On September 22, 1982, the respondent, Thomas LeStrange, died.

2. The death of the Respondent occurred after the decision of the Third Circuit was rendered. This decision was rendered on September 1, 1982. (See Exhibit A)

3. On March 14, 1983 , an estate was raised on behalf of Thomas LeStrange. The administratrix of said estate is Lee Ann LeStrange Darrone, who was the decedent's daughter. This estate was raised in Lackawanna County at 237 No. and 1983 Term.

4. The death of the Respondent does not cause the instant employment discrimination action to become moot. In addition to reinstatement, the respondent sought back pay as an engineer from 1973 to September 22, 1982. Further, the reinstatement would have made the respondent eligible for medical insurance which would have paid the costs of his last illness.

5. Respondent's testimony in this matter was preserved since he was deposed prior to his death. All other evidentiary issues in the case may be addressed through the testimony of other witnesses.

6. Counsel for the Respondent has conferred with the Clerk of the District Court for the Middle District of Pennsylvania and the Clerk for the Third Circuit Court of Appeals. Both of these offices have indicated that the Supreme Court of the United States now has jurisdiction over these matters, since it has granted the Petition for Writ of Certiorari.

WHEREFORE, Respondent now prays that This Honorable Court substitute "Lee Ann LeStrange Darrone, as Administratrix of the Estate of Thomas LeStrange", for Thomas LeStrange, now deceased, in this case.

LENAHAN & DEMPSEY

JOSEPH P. LENAHAN, ESQ.

CERTIFICATE OF SERVICE

Joseph P. Lenahan, Esq., hereby certifies that he served a true and correct copy of the foregoing Motion for Substitution of Parties suggesting Death of the Respondent upon Harry A. Rissetto, Esq., 1800 M Street, NW, Suite 800 North, Washington, DC 20036 by sending same First Class, U. S. regular Mail on March 14, 1983.

LENAHAN & DEMPSEY

JOSEPH P. LENAHAN, ESQ.

REGISTER OF WILLS OF LACKAWANNA COUNTY

Form R/W 9-6-80 5M

SHORT CERTIFICATE – LETTERS OF ADMINISTRATION

Commonwealth of Pennsylvania } ss:
Lackawanna County

I, Samuel C. Cali, Register of Wills in and for the County of Lackawanna in the Commonwealth of Pennsylvania,

DO HEREBY CERTIFY that on the 14th day of March, 1983,

LETTERS OF ADMINISTRATION on the Estate of Thomas LeStrange

deceased, were granted to Iee Ann LeStrange Darrone

having first been qualified well and truly to administer the same. And I further certify that no revocation of said Letters appears of record in my office.

Date of Death Sept. 22, 1982

Social Security No. 182-16-4373

Estate No. 237-1983

Given under my hand and seal of office this 14th day of March, 1983

Samuel C. Cali

Register / Deputy Register

NOT VALID WITHOUT ORIGINAL SIGNATURE AND IMPRESSED SEAL

Exhibit A

Office-Supreme Court, U.S.
FILED
MAY 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a handicapped applicant for employment may maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, where the primary objective of the employer's Federal financial assistance is unrelated to employment.

2. Whether a handicapped applicant for employment who cannot demonstrate a nexus between the denial of employment and a specific program supported by Federal financial assistance may nevertheless maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794.

3. Whether a private right of action exists under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794.

A complete list of the parties to the proceeding in the court below is contained in the caption of the case in this Court. A listing of all subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioner Consolidated Rail Corporation has been included within the Petition for a Writ of Certiorari, at ii.

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No. 82-862

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

CITATIONS OF OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit has been reported at 687 F.2d 767 (3d Cir. 1982) and is included within the Joint Appendix, commencing at page A-32. The Opinion and Order of the United States District Court for the Middle District of Pennsylvania, No. 78-0944 on November 4, 1980, have not been reported and appear in the Appendix to the Petition for a Writ of Certiorari, commencing at page A-25. A prior Opinion and Order of the United States District Court for the Middle District of Pennsylvania are reproduced at page A-53 of the Appendix to the Petition for a Writ of Certiorari and are reported at 501 F. Supp. 964 (M.D. Pa. 1980).

JURISDICTION

The judgment of the Court of Appeals was entered on September 1, 1982. The Petition for a Writ of Certiorari was filed on November 22, 1982 and was granted on February 22, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §794, as amended Pub.L. 95-602, Title I, §§119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987:

> Nondiscrimination under federal grants and programs; promulgation of rules and regulations.
>
> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. §794a, Pub.L. 93-112, Title V, §505, as added Pub.L 95-602, Title I, §120, Nov. 6, 1978, 92 Stat. 1982:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor, or other appropriate relief, in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §2000d, Pub.L. 88-352, Title VI, §601, July 2, 1964, 78 Stat. 252:

Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from

participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d-3, Pub.L. 88-352, Title VI, §604, July 2, 1964, 78 Stat. 253:

Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment.

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

20 U.S.C. §1681, Pub.L. 92-318, Title IX, §901, June 23, 1972, 86 Stat. 373:

Sex

Prohibition against discrimination; exceptions. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

STATEMENT OF THE CASE

This is an action alleging handicap discrimination in employment in which the Court of Appeals held that the mere receipt of Federal financial assistance by Petitioner Consolidated Rail Corporation ("Conrail"), regardless of the nature, purpose or beneficiaries of such assistance, was sufficient to enable a handicapped applicant for employment to maintain a cause of action under Section 504 of the Rehabilitation Act of 1973, as amended by the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, 29 U.S.C. §794 ("Section 504").

This action was commenced on September 22, 1978 by Respondent Thomas LeStrange, who alleged that Petitioner Conrail failed to employ him as a locomotive engineer by reason of his physical handicap, *i.e.*, the amputation of his left hand and a portion of his left forearm. The jurisdiction of the District Court was invoked under, *inter alia*, Section 504.

There is no dispute in the instant matter that Conrail has received federal funding through the purchase of securities pursuant to Section 216 of the Regional Rail Reorganization Act of 1973 ("3R Act"), 45 U.S.C. §726. In addition, Conrail has received federal funding through reimbursement for employee protective benefits authorized by Title V of the 3R Act, 45 U.S.C. §§771-780, prior to its repeal by the Northeast Rail Services Act of 1981, 45 U.S.C. §§1101-1116, and currently by Title VII of the 3R Act, 45 U.S.C. §797a, as amended.

Conrail filed a Motion for Summary Judgment on September 10, 1981 on the ground that LeStrange lacked standing to raise a claim for violation of Section 504. On October 20, 1981, Judge Rambo granted Conrail's Motion for Summary Judgment, holding that LeStrange could not demonstrate standing to sue under Section 504 because: (1) Conrail did not receive federal funding with a primary objective of providing employment; (2) LeStrange was not an intended beneficiary of the Federal financial assistance to Conrail; and (3) any alleged discrimination in the failure to employ

LeStrange did not cause discrimination against the primary beneficiaries of federal aid. (Pet.App. at A-25 through A-46).[1]

LeStrange appealed Judge Rambo's decision to the United States Court of Appeals for the Third Circuit. The Court of Appeals reversed the district court and remanded the case for further consideration and disposition on the merits. The court concluded that Section 504 prohibited employment discrimination on the basis of handicap by federal grantees, regardless of the nature, purpose or intended beneficiaries of the Federal financial assistance, and that such a prohibition could be enforced by means of a private cause of action. (Jt.App. at A-32 through A-54).

SUMMARY OF ARGUMENT

The decision below, creating a private right of action for handicap discrimination in employment against all federal grantees, has displaced a contrary Congressional policy judgment, set forth in the express language and legislative history of the Rehabilitation Act of 1973. This judgment must be left to Congress, which has not evinced any intention to create such a broad cause of action.

I. Section 504 of the Rehabilitation Act, in language virtually identical to that contained in Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, prohibits discrimination against qualified handicapped individuals under any program or activity receiving Federal financial assistance. The enforcement provisions of Section 504, set forth in Section 505(a) of the Act, as amended, expressly incorporate the "remedies, procedures and rights" set forth in Title VI into the Rehabilitation Act. Included among the "remedies, procedures and rights" set forth in Title VI is the specific limitation contained in Section 604, 42 U.S.C. §2000d-3, prohibiting agency or department action under Title VI

1. Appendix to Petition for a Writ of Certiorari, hereinafter "Pet.App.". The Joint Appendix shall be referred to as "Jt. App."

unless a primary objective of the federal funding is to provide employment. Section 604 was included within Title VI to manifest the clear Congressional intent that any enforcement activity regarding employment practices be related to the purpose of the federal funding, in order to avoid funding termination of programs in which no discrimination occurred. As incorporated within the Rehabilitation Act, Section 604 similarly operates as a clear limitation on employment discrimination actions under Section 504.

II. In finding that LeStrange could maintain an employment discrimination action on the basis of handicap without regard to the nature, purpose or beneficiaries of the Federal financial assistance, the Court of Appeals failed to consider whether LeStrange encountered the alleged discrimination as a participant in, or beneficiary of, a specific program supported by federal funding. In so doing, the Court of Appeals ignored this Court's explicit admonition in *North Haven* that any enforcement activity under Section 901 of Title IX of the Education Amendments of 1972 must have a "program-specific" focus. In light of the identical language utilized in Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act, as well as the legislative history of those statutes, this proceeding cannot be maintained without a showing of a nexus between a specific federally funded program and the denial of employment to LeStrange.

III. The Rehabilitation Act does not establish an express cause of action for the private enforcement of Section 504. Indeed, the language and legislative history of the statute demonstrates that a private cause of action should not be implied. Section 505 of the Rehabilitation Act adopts the "remedies, procedures and rights set forth in Title VI." No private cause of action is set forth in Title VI; the Rehabilitation Act should not be expanded to create a remedy which was not included by Congress. If a private cause of action is found to exist under Section 504, it should be limited solely to injunc-

tive relief. Neither the wording of Section 504, nor its legislative history, provide any indication that Congress intended that the anti-discrimination provision could be enforced through private lawsuits for monetary relief. In the absence of any evidence of Congressional intent to create an action for damages, the federal courts should hesitate to create a legal entitlement to a monetary remedy.

ARGUMENT

I. THE REHABILITATION ACT OF 1973, AS AMENDED, DOES NOT PERMIT THE MAINTENANCE OF EMPLOYMENT DISCRIMINATION ACTIONS WHERE THE PRIMARY OBJECTIVE OF THE FEDERAL FINANCIAL ASSISTANCE IS UNRELATED TO EMPLOYMENT

The Rehabilitation Act of 1973 was enacted to provide comprehensive federal programs of assistance for the training and rehabilitation of handicapped individuals. *See* S. Rep. No. 318, 93d. Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076. Among the programs authorized by the Rehabilitation Act were the provision of federal grants for State rehabilitation plans, 29 U.S.C. §§720-750, for research and training projects, 29 U.S.C. §§760-763, and for the construction of rehabilitation facilities, 29 U.S.C. §771. In addition, under the Subchapter V heading of "Miscellaneous Provisions", the Rehabilitation Act established affirmative obligations for federal agencies and contractors to employ handicapped individuals, 29 U.S.C. §§791, 793, and expressed a policy against discrimination by federal grantees, 29 U.S.C. §794.

These provisions demonstrate that Congress fashioned the Rehabilitation Act in 1973 primarily as a funding statute to facilitate the provision of services to handicapped individuals. It is not focused remedial legislation providing for the judicial enforcement of specifically defined substantive rights. Assuming *arguendo*

that a private action may be maintained under Section 504,[2] what is the scope of this cause of action in light of the language of the statute, its legislative history, and decisions of the Court? Conrail contends that actions alleging handicapped discrimination in employment may be maintained only where the primary objective of the federal funding is related to employment.

A. The Plain Language of the Rehabilitation Act Contains an Express Limitation Upon Employment Discrimination Actions.

As frequently noted by the Court, "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring). Section 504 of the Rehabilitation Act provides, in pertinent part:

> No otherwise qualified handicapped individual in the United States . . ., shall, solely by reason of his handicap, be denied the benefits of, or be subjected to discrimination under any program of activity receiving Federal financial assistance. . . .

29 U.S.C. §794. Because Section 504 contains no express enforcement provisions, Congress amended the Rehabilitation Act in 1978 by including a new Section 505, which provides, *inter alia*, that:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

§505(a)(2), 29 U.S.C. §794a(a)(2).

Thus, Congress intended to enforce Section 504 through the remedies, procedures and rights established by Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. Title VI contains a broad prohibition against ra-

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2. *See supra*, at pp. 30-47.

cial discrimination in Section 601 virtually identical to that contained in Section 504 with respect to handicap discrimination.[3] 42 U.S.C. §2000d. Title VI also authorizes administrative enforcement of that Title in Section 602, 42 U.S.C. §2000d-1, and judicial review of agency action in Section 603, 42 U.S.C. §2000d-2. More importantly for purposes of the instant matter, Title VI contains the following limitation in Section 604:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. §2000d-3.

Accordingly, the "remedies, procedures and rights" set forth in Title VI, incorporated into Section 504 by the 1978 Amendments to the Rehabilitation Act, include the express limitation upon employment discrimination actions established by Section 604 of Title VI. This limitation is applicable, therefore, to actions commenced under Section 504 of the Rehabilitation Act. Based upon this analysis:

> The great weight of authority holds that claims of employment discrimination under §504 cannot be maintained unless a primary objective of the federally funded activity or program is to provide employment.

Meyerson v. State, 507 F. Supp. 859, 863 (D. Ariz. 1981). Four Courts of Appeals have explicitly adopted this analysis: *Scanlon v. Atascadero State Hosp.*, 677 F.2d 1271 (9th Cir. 1982); *United States v. Cabrini*

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3. Section 601 of Title VI, 42 U.S.C. §2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Medical Center, 639 F.2d 908 (2d Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), as have a majority of lower courts.[4]

The Court of Appeals rejected this analysis by first adopting a presumption that the broad language of Section 504 could not be restricted by implicit limitations upon employment discrimination actions. 687 F.2d at 769-70 (Jt.App at A-37). This presumption was formed by the Third Circuit's interpretation of *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S. Ct. 1912 (1982), in which the Court examined the language of Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681,[5] and found that "[b]ecause §901(a) neither expressly nor impliedly excludes employees from its reach . . ." allegations of employment discrimination were actionable under Title IX, "unless other considerations counsel to the contrary." 102 S.Ct. at 1918.

The Court of Appeals' reliance on Section 901 of Title IX as interpreted in *North Haven* is misplaced; neither Section 901 nor *North Haven* can fairly be applied outside the context of Title IX. The Court in *North Haven* relied in large part upon an aspect of Title IX's sparse legislative history relating to the deletion of a pro-

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4. *Moxley v. Vernot*, 555 F. Supp. 554 (S.D. Ohio 1982); *Davis v. Modine Mfg Co.*, 526 F. Supp. 943 (D. Kan. 1981); *Sabol v. Bd. of Educ.*, 510 F. Supp. 892 (D.N.J. 1981); *Guertin v. Hackerman*, 496 F. Supp. 593 (S.D. Tex. 1980). *Contra Jones v. Metropolitan Atlanta Rapid Transit Auth. ("MARTA")*, 681 F.2d 1376 (11th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3535 (U.S. Jan 11, 1983) (No. 82-1159); *Hart v. County of Alameda*, 485 F. Supp. 66 (N.D. Cal. 1979).

5. Section 901 provides, in pertinent part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . .

posal originally included as Section 1004 within the House version of Title IX, H.R. 7248, 92d Cong., 1st Sess., the Higher Education Act of 1971, which was identical to the language of Section 604 of Title VI.

The deletion of the House proposal of Section 1004 from the final version of Title IX signaled to the Court that Congress did not intend the employment restrictions upon Title VI to apply to Title IX. *See* 118 Cong. Rec. 24684 n.1 (1972) (Sen. Bayh)[6]. The Court concluded that "[i]f Congress had intended that Title IX have the same reach as Title VI . . . we assume that it would have enacted counterparts to both §601 and §604 [of Title VI]." 102 S.Ct. at 1922.

By contrast, in the 1978 Amendments to the Rehabilitation Act, Congress did enact a counterpart to Section 604 of Title VI. Section 505 of the Rehabilitation Act incorporates the "remedies, procedures and rights" of Title VI into Section 504, without excluding the express limitation contained in Section 604. Therefore, in contrast to the Court's finding in *North Haven* with respect to Title IX, the language of the Rehabilitation Act demonstrates Congress' intent to apply the entire enforcement scheme of Title VI to Section 504.

The court below rejected this straightforward interpretation of the statutory language, reasoning instead that Section 505(a)(2) of the Rehabilitation Act had limited impact because it only related to the provisions of Title VI that referred to "persons." Since only Section

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6. The court in *North Haven* also relied upon post-enactment legislative history to demonstrate that Congress considered, but did not disapprove, HEW regulations that did not contain the Section 604 limitation. 102 S.Ct. at 1923-25. Moreover, Congress did not pass later proposed amendments to Title IX that would have explicitly precluded Title IX employment discrimination actions. *Id.* at 1925. Finally, Title IX contained, in Sections 902 and 903, analogs to Section 602 and Section 603 of Title VI, which underscore Congress' deliberate deletion of an analog to Section 604. By contrast, Section 504 contains *no* independent enforcement procedures beyond those incorporated by Section 505.

603, 42 U.S.C. §2000d- 2, provides for any rights or remedies for *persons*,[7] the only Title VI "remedies, rights and procedures" extended to the Rehabilitation Act by Section 505(a)(2) consisted of a single provision, Section 603, addressing judicial review of agency action. The remaining five provisions of Title VI were inapplicable to the Rehabilitation Act. Consequently, the Court of Appeals found that Section 604 of Title VI could not limit a private action under Title VI or Section 504 because it refers to action by "any department or agency", not persons.

It is evident from the language of Title VI that the statute's enforcement scheme depends on agency action, pursuant to regulations, to effectuate the broad nondiscrimination policy established in Section 601. *See* Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 GEO.L.J. 1 (1981). Section 602 provides administrative safeguards for recipients of federal funding prior to such agency action and Section 603 provides for judicial review of any agency determination by "any person aggrieved" by such action. In Section 604, however, Congress expressly prohibited agencies from acting, with respect to employment practices, unless "a primary objective of the Federal financial assistance is to provide employment."

This emphasis upon agency action, rather than private lawsuits, to secure compliance with Title VI explains the existence of only a single reference to "persons" in Title VI. Simply put, only agency action was circumscribed in Section 604, because only agency action was contemplated. The court assumed that because Congress did not anticipate private enforcement of Title VI, Congress could not have intended to limit such enforcement.

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7. The pertinent provisions of Title VI in effect as of the passage of the 1978 Amendments to the Rehabilitation Act are set forth in Attachment A, attached hereto.

The illogic of this analysis is apparent, for it simply does not follow that a court can impute from Congressional silence an intent to give *greater* rights to private litigants than to the agencies charged with the responsibility for interpreting and enforcing Title VI. Similarly, by opening the remedies of Title VI to "persons" aggrieved under the Rehabilitation Act, Congress did not intend to invest individuals with substantive rights broader than, and independent from, those subject to agency definition, administration and enforcement. As recently recognized by the Court:

> Since §504 was patterned after Title VI of the Civil Rights Act of 1964, it was understood that responsibility for enforcing it, insofar as it regulated private recipients of federal funds, would lie with those agencies administering the federal financial assistance programs. . . . When the Act was amended in 1978, that understanding was made explicit.

Community Television of S. Cal. v. Gottfried, 51 U.S.L.W. 4134, 4137 (U.S. Feb. 22, 1983) (No. 81-298).

The Court of Appeals' holding leads to the anomalous conclusion that the more detailed the rights and procedures given to a protected group by Congress, the greater the restrictions upon those rights. Thus, by providing specific protection under Sections 501 and 503,[8] Congress provided less protection to employees under those Sections than that given to employees of federal grantees under the general language of Section 504. In addition, the court created two standards for compliance with the same provision: one applicable in an agency enforcement proceeding, and the other, in a private court action.

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8. Sections 501 and 503 of the Rehabilitation Act are set forth in Attachments B and C, respectively, attached hereto.

B. The Legislative History of the Rehabilitation Act and Title VI of the Civil Rights Act of 1964 Demonstrates That Congress Intended to Limit Actions Alleging Employment Discrimination Under Those Acts.

A review of the pertinent legislative history of both statutes is consistent with the clear statutory language set forth above and contains no evidence that Congress intended to establish an employment discrimination remedy of the scope created by the Court of Appeals.

1. Congress intended Title VI to apply to employment discrimination only where the primary objective of federal funding was to provide employment.

The legislative history of Title VI demonstrates that Congress refrained from intensively regulating federal grantees to minimize utilization of the ultimate funding termination sanction, particularly in cases where such decisions were unrelated to the purpose of the federal funds. Representative Celler emphasized the limited nature of Title VI:

> The title will not punish innocent beneficiaries of Federal aid for wrongs committed by others. . . . As to each assisted program or activity, title VI will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect to whom the principle declared in Title VI would apply.

110 Cong. Rec. 1520-21 (1964) (Rep. Celler). Thus, Title VI would be enforced only to ensure protection of the specific participants and beneficiaries for whom the federal funds were intended.

In response to an inquiry as to whether Section 601 covered employment discrimination, Representative Rodino, ranking majority member of the Committee on the Judiciary, reiterated the limitation noted by Repre-

sentative Celler: "I believe it would be necessary to look at each program to determine what the purpose of that program is in order that we might find out whether it is covered." 110 Cong. Rec. 2484 (1964) (Rep. Rodino).

The legislative history of Title VI is replete with such references to an explicit Congressional understanding that the employment practices of a recipient of federal funds would not be affected unless the purpose of the funds was to provide employment. Thus, Representative Celler discussed this specific limitation in the context of the Agricultural Production Act, 7 U.S.C. §§602-673, when he stated:

> [T]he purpose of acreage allotments under the Agricultural Production Act is to assist farmers by stabilizing production and prices; it is not basically concerned with farm employment. As applied to this program, Title VI would preclude discrimination in connection with the eligibility of farmers for allotment payments—but would not require action to end discriminatory employment practices by farmers receiving allotments.

110 Cong. Rec. 1521 (1964) (Rep. Celler). *See also* 110 Cong. Rec. 7060 (1964). (Sen. Pastore); 110 Cong. Rec. 10076 (Attorney General Kennedy).

In order to respond to the concerns of Congressional critics, Senator Humphrey introduced Section 604, to expressly preclude agency action under Title VI with respect to employment practices except where a primary objective of the Federal financial assistance was to provide employment. At that time, Senator Humphrey noted "[t]his provision is in line with the provisions of section 602 and serves to spell out more precisely the declared scope of coverage of the title." 110 Cong. Rec. 12720 (1964) (Sen. Humphrey).

The court below assumed, without citing any legislative authority, that Section 604 was included within Title VI primarily to avoid a duplication of federal agency

effort, in light of the availability of Title VII for relief from employment discrimination. 687 F.2d at 769-70 (Jt. App. at A-38 through A-40). The Congressional debates on Title VI contain no mention of this rationale as the basis for Section 604.[9] Section 604 was enacted to prevent sanctions against employment practices of recipients of federal funds where employees were not the intended beneficiaries of such monies supplied for non-employment related purposes. As noted by the United States Court of Appeals for the Fifth Circuit:

> Congress did not, of course, intend to provide a forum for the relief of individual teachers who might be discriminatorily discharged; Congress was interested in a general requirement essential to success of the program as a whole.

United States v. Jefferson Cty. Bd. of Educ., 372 F.2d 836, 883 (*1966*), *cert. denied*, 389 U.S. 840 (1967).

To effectuate the clearly articulated Congressional intent to utilize agency enforcement as the means to ensure compliance with Title VI, the express restrictions of Section 604 must also apply to any private actions to enforce individual rights directly under Section 601. If such were not the case, the detailed procedural safeguards established by Congress in Sections 602 and 603 would be eviscerated by individual actions. Indeed, because the administrative complaint procedures are limited by Section 604, individuals claiming employment discrimination under Section 601 not only *could* evade the regulations established for federal agencies under Section 602, but they would be *required* to do so. Thus, merely by accepting a federal grant, employers would be subject to judicial intervention in discrimination disputes outside the statutory scheme and the scope

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9. Public employees were not subject to Title VII until 1972. Pub. L. 92-261 (March 24, 1972). Thus, Title VII was not available to persons with employment claims against a substantial portion of all federal grantees.

of administrative regulation.[10] *Valentine v. Smith*, 654 F.2d 503 (8th Cir.), *cert. denied*, 454 U.S. 1124 (1981); *Association Against Discrimination In Employment, Inc. v. Bridgeport*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

In an analogous case, the Court recently recognized that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Similarly, by enacting Title VI, Congress intended only to prevent the utilization of federal funds in a discriminatory manner. At the same time, Congress did not intend to attach disproportionate conditions upon the receipt of federal assistance, nor did it intend to punish innocent beneficiaries through wholesale funding sanctions.

When Congress in 1973 decided to deal with the problem of handicap discrimination, it deliberately chose the pattern of Title VI, rather than the more extensive and employment-related Title VII. Accordingly, the limitations described above must also be applied to actions under the Rehabilitation Act.

2. Congress intended the limitations of Title VI to apply to actions under Section 504 of the Rehabilitation Act.

In the Rehabilitation Act of 1973, Congress enacted Section 504 as a broadly worded prohibition of discrimination on the basis of handicap by recipients of Federal financial assistance. Section 504 contained no enforcement provisions analogous to Sections 602 and 603 of Title VI and Sections 902 and 903 of Title IX. The Court of Appeals assumed that the broad language of Section 504 must be construed to provide a remedy against all

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10. To the extent that such private actions would not be limited to individual relief, the absence of procedural safeguards grows even more acute. Courts have long recognized the private right to seek funding terminations under Title VI. *See Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971); *Hardy v. Leonard*, 377 F. Supp. 831 (N.D. Cal. 1974).

discrimination, including employment discrimination, without regard to the purpose of the federal funding. The 1973 legislative history of Section 504 demonstrates, however, that Congress intended that provision to be a statement of policy — not the starting point for the creation of entirely new substantive rights that exceed those established by Title VI.

The Rehabilitation Act was initially submitted as H.R. 8395 and its counterpart in the Senate as S.3987 to amend the Vocational Rehabilitation Act, which was to expire on June 30, 1972. As noted by the Senate Report on the Rehabilitation Act, the federal vocational rehabilitation program, offering training, counselling and placement services for the physically handicapped, was first enacted as the Smith-Fess Act in 1920, Pub. L. 66-836, and subsequently expanded to cover the mentally disabled and to provide restorative services, grant-in-aid programs, and to establish the Vocational Rehabilitation Administration to oversee the programs.[11] Congress determined in 1972 that the Act required more comprehensive provisions in order to aid the most severely disabled. S. Rep. No. 1135, 92d Cong., 2d Sess., *reprinted* in 118 Cong. Rec. 32281, 32283 (1972).

Section 504 was not included in the original House version, H.R. Conf. Rep. No. 1581, 92d Cong., 2d Sess., *reprinted in* 118 Cong. Rec. 35141, 35163 (1972), but was added by the Senate bill to "proclaim a policy of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." S. Rep. No. 1135, 92 Cong., 2d Sess. *reprinted in* 118 Cong. Rec. 32281, 32294 (1972). This description of Section 504 was also included in the final Senate report, S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted* in 1973 U.S. Code Cong. & Ad. News at 2123. Indeed, Section 504 was included within Title V of the Act — "Miscellaneous Provisions."

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11. S. Rep. No. 318, 93d Cong., 1st Sess. n.8, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2082-83.

By contrast, Congress specifically addressed the employment rights of federal agency and federal contractor employees. With regard to employees of federal agencies, Congress established in Section 501 of the Act, 29 U.S.C. §791, a Federal Interagency Committee on Handicapped Employees "to insure that there is no discrimination in employment of handicapped individuals by and within the agencies of the federal government in hiring, placement or advancement." S. Rep. No. 1135, 92d Cong., 2d Sess., *reprinted* in 118 Cong. Rec. 32281, 32293 (1972). Section 503 of the Act, 29 U.S.C. §793, mandated affirmative action in employment of the handicapped persons by federal contractors with federal contracts in excess of $2,500, and provided an administrative mechanism to process complaints of handicapped individuals.[12]

Thus, the legislative history of the 1973 Act provides no evidence that Congress intended to establish any remedy against employment discrimination by federal grantees.[13] *Compare Pennhurst State School and Hospital v. Halderman, supra* ("Bill of Rights" in federal

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12. The court below identified several comments by Senators referring to employment discrimination as evidence that Section 504 was intended to provide protection against such discrimination. It is far more likely that these remarks were stated in the context of employment discrimination covered by Sections 501 and 503. Thus, for example, Senator Stafford's concern with "unfounded discrimination in employment" mentioned by the court below at 687 F.2d at 773n. 3 (Jt.App. at A-43 n.3), was stated in connection with his opposition to an amendment offered by Senator Taft to delete provisions establishing four new subagencies within HEW, none of which would have had any authority over Section 504 complaints. 119 Cong. Rec. 5893 (1973).

13. The broad comments of Senator Javits, emphasizing "opportunities for employment of the handicapped" 119 Cong. Rec. 5887 (1973), and Senator Cranston, seeking "accomplishments in employment for handicapped individuals." 119 Cong. Rec. 5882 (1973), referred to by the court below as 687 F.2d at 773 (Jt.App. at A-44 through A-45) can be viewed as expressions of the overall purposes of the Act, which certainly included provisions dealing with training, grants and affirmative action in employment.

legislation was statement of policy, rather than condition on receipt of federal funds). As noted by the Court:

> Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that, though falling short of legislating its goal, serve as a nudge in the preferred directions.

Rosado v. Wyman, 397 U.S. 397, 413 (1970), *as quoted in Pennhurst*, 451 U.S. at 19.

Congressional intent regarding the scope of Section 504 evolved the following year when Congress passed the Rehabilitation Act Amendments of 1974 Pub. L. 93-516, 88 Stat. 1619, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373. Senate Report No. 1297 accompanying the Amendments explicitly noted that Section 504 was to be interpreted and enforced *in pari materia* with Title VI:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 20 U.S.C. 1681 (relating to sex). . . .
>
> The language of section 504, in following the above-cited Acts, further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations . . . attempts to bring non-complying recipients into voluntary compliance . . . and the imposition of sanctions. . . . This approach to implementation of section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process, (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action.

Id., 1974 U.S. Code Cong. & Ad. News at 6390-91. *See also* 120 Cong. Rec. 30551 (1974) (Sen. Stafford).

In 1978, Congress confirmed its intent to require parallel enforcement of Title VI and Section 504 by enacting the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub.L. 95-602, 92 Stat. 2955, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, as amendments to the Rehabilitation Act. This Act included a new Section 505, which provided that the enforcement procedures set forth in Title VI would apply to the Rehabilitation Act.

When the 1978 Amendments were considered, administrative enforcement of Title VI had been limited by the requirements of Section 604, 45 C.F.R. §80.3(c). In addition, at least one judicial interpretation of Title VI as of 1978 construed Section 604 to apply to private actions under Title VI. *Feliciano v. Rommey*, 363 F. Supp. 656 (S.D.N.Y. 1973). *See also United States v. Jefferson Cty Bd of Educ.*, 372 F.2d at 883. By contrast, no court had permitted a private employment discrimination action to go forward under Title VI where the purpose of the funding was unrelated to employment.[14]

The Court must presume that Congress in 1978 was aware of the judicial interpretation of Title VI, as well as the regulations promulgated by the federal agencies responsible for enforcing the statute. As noted by the Court, "where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 581 (1978). Accordingly, by incorporating the "remedies, procedures and

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14. Several private Title VI employment discrimination cases against police departments were considered prior to 1978 without discussion of Section 604, presumably because the employment purpose of the federal funding was conceded. *Afro-American Patrolmen's League v. Duck*, 503 F.2d 294 (6th Cir. 1974); *Ortiz v. Bach*, 14 Fair Empl. Prac. Cas. (BNA) 1019 (D. Col. 1977); *Hardy v. Leonard*, 377 F. Supp. 831 (N.D. Cal. 1974).

rights" set forth in Title VI into Section 504, and by repeatedly evincing an intent to require identical enforcement of the two statutes. Congress adopted the same restrictions applicable to Title VI, including Section 604, for Section 504.

The application of Section 604 to both administrative and private actions under Section 504 of the Rehabilitation Act promotes the same policy considerations that motivated Congress with respect to Title VI. As a funding statute primarily designed to implement and assist programs for the training, care and rehabilitation of the handicapped, any sanctions designed to withhold those funds as an incentive to prevent discriminatory practices would have to be carefully tailored to avoid harming innocent beneficiaries of federal funds. This potential conflict in legislative goals is brought into sharp relief when the alleged discrimination does not affect the objectives of the federal assistance. As the Court observed in *Pennhurst*, if Congress intended to condition all federal grants, regardless of the purpose or scope of such assistance, upon certain obligations with respect to decisions unrelated to the federal grants, Congress would have done so unambiguously. Accordingly, agencies charged with the responsibility of enforcing both Section 504 and Title VI should operate under the same Section 604 limitation for both statutes. If such were not the case, the "administrative consistency" envisioned by the 1974 Senate Report would never be attained, because Section 504 would be enforced in a far broader manner than Title VI.

Congress considered, but never enacted, several proposals to amend Title VII to include handicap discrimination.[15] Congress could have explicitly deleted Section 604 from the "remedies, procedures and rights"

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15. Senators Percy and Humphrey introduced S. 3458 on April 7, 1972, to amend Title VII to make discrimination on the basis of handicap an unlawful employment practice. 118 Cong. Rec. 11788 (1972). Subsequently, Senator Williams introduced a similar bill, S. 446, on February 22, 1979. *See* S. Rep. No. 316, 96th Cong., 2d Sess. (1979).

incorporated into Section 504 by Section 505(a) of the 1978 Amendments. These negative implications of Congressional intent have been ignored by the court below, in refusing to apply Section 604 to the instant matter. *See Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 592 (1980).

The court below, discovering no direct evidence of intent, relied upon a Senate Report accompanying the original Senate bill of the 1978 Amendments, to find that Congress intended Section 504 to encompass employment discrimination claims against all federal grantees. 687 F.2d at 774 (Jt. App. at A-46) This Report stated:

> It is the Committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement.

S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). The court below construed these statements to indicate an approval of the HEW regulations implementing Section 504 which were promulgated prior to the 1978 Amendments.[16] These regulations, which interpreted Section 504 to be "consistent with the . . . regulations implementing Title IX . . . and . . . Section 503 . . ." 42 Fed. Reg. 22688, do not contain any requirement that the primary purpose of the Federal financial assistance be to

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16. Although S. Rep. No. 1297 suggested that the HEW should promulgate regulations coordinating the enforcement of Section 504 among federal agencies, 1974 U.S. Code Cong. & Ad. News at 6391, HEW refused to do so in light of the lack of express statutory authority. HEW finally submitted draft and proposed regulations, 41 Fed. Reg. 20296 (May 17, 1976), 41 Fed. Reg. 29548 (July 16, 1976), in response to Executive Order No. 11914 (April 28, 1976), 41 Fed. Reg. 17871 (April 29, 1976), which directed HEW to do so. The final Section 504 regulations, 42 Fed. Reg. 22676 (May 4, 1977), *codified at* 45 C.F.R. Pt. 84, were promulgated only after a court order was obtained in *Cherry v. Mathews*, 419 F. Supp. 922 (D.D.C. 1976).

provide employment as a condition to the imposition of sanctions under Section 504, in direct contrast to Title VI, and the regulations promulgated thereunder. *Compare* 45 C.F.R. §84.11(a)(1) (Section 504) *with* 45 C.F.R. §80.3(c). (Title VI).

Clearly, the Senate Committee believed that enforcement of Section 504 should follow enforcement of Title VI, not Title IX, as stated by HEW. The Committee apparently overlooked the differences between the HEW regulations promulgated under Title VI and Section 504, for, with respect to employment practices, the two sets of regulations did *not* "conform", nor did the new 504 regulations "codify existing practice." [17]

Congress' overarching intention was that Section 504 be enforced in the same manner as Title VI. To the extent the HEW regulations adopted a different enforcement policy, they are inconsistent with legislative intent and, by "go[ing] beyond the carefully worded *nondiscrimination* provision of §504, exceed the powers of the Secretary under §504. The Secretary has no authority to rewrite the statutory scheme by means of regulations." *University of Texas v. Camenisch*, 451 U.S. 390, 399 (1981) (Burger,C.J., concurring) (emphasis in original).

The interpretation of Section 504 in the HEW regulations, and adopted in the regulations promulgated by

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17. The Section 504 regulations did not codify existing practice under Title VI, for the regulations under that Title did not provide for relief from employment discrimination unless the condition set forth in Section 604 was satisfied. The United States District Court for the Eastern District of Pennsylvania did utilize the Section 504 regulations, prior to the 1978 Amendments, to permit private actions alleging handicap discrimination without reviewing the purpose of the federal funding. *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978). Neither case considered the effect of Section 604 upon Section 504, for the Rehabilitation Act did not require it. Interestingly, in *Davis*, the federal assistance was received under the Comprehensive Employment and Training Act, 29 U.S.C. §§841-991, whose purpose was to provide employment.

other agencies under HEW guidelines[18] is not entitled to deference because it "rewrite[s] the statutory scheme." Indeed, the Court noted in *Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979), that these regulations are entitled to little weight.

This deference is further diminished by the failure of either the Department of Health and Human Services or the Department of Justice[19] to amend the guidelines for federal agency enforcement of Section 504 to reflect the 1978 Amendments. Even assuming *arguendo* that private actions would not be necessarily limited by Section 604, certainly that provision would apply to agency enforcement under its explicit terms. Yet the HHS regulations, followed by all other executive agencies, authorize agency action in response to employment discrimination against the handicapped, regardless of the purpose of the federal funding. 45 C.F.R. §84.11.

The Court of Appeals also cited the post-enactment pronouncements of the Senate Committee on Labor and Human Resources in 1979, six years after the original passage of Section 504. The committee report, S. Rep. No. 316, 96th Cong., 1st Sess. (1979), accompanied an unsuccessful bill to amend Title VII to include handicapped employees. This report, disapproving *Trageser*,

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18. Subsequent to the publication of guidelines for Section 504 regulations by HEW, 43 Fed. Reg. 2132 (January 13, 1978), *codified* at 45 C.F.R. Pt. 85, each federal agency issued regulations for the enforcement of Section 504 with respect to their assistance programs. The Department of Transportation, from whom Conrail receives its federal funds, adopted such regulations on May 31, 1979, 44 Fed. Reg. 31468, *codified at* 49 C.F.R. Pt. 27. In 49 C.F.R. §27.31, DOT accepted the HEW interpretation of Section 504 as set forth above.

19. By Executive Order No. 12250 (November 2, 1980), 45 Fed. Reg. 72995 (November 4, 1980), President Carter transferred authority to coordinate agency implementation of Section 504, Title VI and Title IX to the Office of the Attorney-General. The Department of Justice thereafter simply adopted the HEW implementation guidelines for Section 504, by transferring these guidelines from 45 C.F.R. Pt. 85 to 28 C.F.R. Pt. 41. 46 Fed. Reg. 40686 (August 11, 1981).

should be accorded little weight for "[a] mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty" than subsequent legislation declaring the intent of an earlier statute. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). *See also Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).[20]

"Absent a clear indication of legislative intent to the contrary, the statutory language controls its construction." *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981). The clear language of Section 505 demonstrates Congressional intent to include all of the Title VI "remedies, procedures and rights", including Section 604, into Section 504. Any other construction would mean such "remedies" would only include a single provision, Section 603. Moreover, the interpretation of the court below ineluctably leads to the conclusions that (1) Congress intended to provide broader rights for employees of federal grantees than for employees of federal agencies and contractors, despite specific language to the contrary in the Rehabilitation Act, (2) that Congress intended employees of federal grantees to have greater enforcement rights than federal agencies responsible for the implementation of Section 504, and (3) that Congress intended to permit employees of federal grantees to sue in federal court and ignore administrative procedures due to the lack of federal agency authority to act.

Such a broad, far-ranging right, in derogation of the limited purposes of Section 504, should not be assumed merely from a single nondiscrimination provision. The Court has recognized that "we are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it. '[I]t is

20. In any event, if Congress had intended the result envisioned by the Senate Committee, it could have amended Section 504 to expressly exclude Section 604 from the operation of its enforcement provisions in order to deal with *Trageser* and subsequent court decisions so limiting Section 504.

not for us to fill any *hiatus* Congress has left in this area.' " *Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979), *quoting Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963). The court below created a remedy that Congress did not provide. Therefore, the decision of the court below should be reversed.

II. THE FAILURE OF THE THIRD CIRCUIT TO REQUIRE A NEXUS BETWEEN A SPECIFIC PROGRAM SUPPORTED BY FEDERAL FINANCIAL ASSISTANCE AND THE DENIAL OF EMPLOYMENT VIOLATED THE "PROGRAM-SPECIFIC" NATURE OF SECTION 504

The Court of Appeals did not require LeStrange to show any connection between his claim and a particular program supported by such funding. By thus ignoring the "program-specific" mandate of Section 504, the court misconstrued the Rehabilitation Act, and misapplied relevant portions of the Court's decision in *North Haven*, 102 S.Ct. at 1926-28. For those reasons, the decision below should be reversed.

A. The Language of the Rehabilitation Act is Program-Specific

Under Section 504, a qualified handicapped individual may not be discriminated against "*under any program or activity receiving Federal financial assistance. . . .*" 29 U.S.C. §794 (emphasis added). By its very terms, Section 504 operates only to prohibit discriminatory practices with respect to a particular federally funded program.

The "program-specific" language of Section 504 is identical to that contained in Section 601 of the Civil Rights Act of 1964, 42 U.S.C. §2000d. Moreover, one of the "remedies, rights and procedures" set forth in Title VI incorporated into the Rehabilitaton Act is Section 602 which provides, in pertinent part:

> Compliance with any requirement adopted pursuant to this section may be effected (1) by the termi-

> nation of or refusal to grant or to continue assistance *under such program or activity* . . . but such termination or refusal . . . *shall be limited in its effect to the particular program or part thereof, in which such noncompliance has been found*. . . .

42 U.S.C. §2000d-1 (emphasis added).

These program-specific restrictions are identical to those in Sections 901 and 902 of the Education Amendments of 1972, which were examined by the Court in *North Haven*, 102 S.Ct. at 1926-28. Indeed, in finding that the provisions of Title IX were program-specific, the Court relied in part upon the similarity of Titles VI and IX, *North Haven*, 102 S.Ct. at 1927. While explicitly refraining from defining "program", *id.* at 1926, the Court nevertheless implied that Title IX requirements would be satisfied in this respect if "the complaining employees' salaries were . . . funded by federal money, . . . the employees . . . work in an education program that received federal assistance, or . . . the discrimination they allegedly suffered . . . affect[ed] a federally funded program." *Id.* at 1927. Thus, there must be some nexus between the alleged discriminatory activity and a specific program receiving federal funding. The Court remanded *North Haven* because "the Court of Appeals paid insufficient attention to the 'program-specific' nature of the statute." *Id.* at 1926.

Like the Second Circuit in *North Haven*, the Court of Appeals "paid insufficient attention to the 'program-specific' nature of the statute" *Id.* at 1926. The court made no findings that the position for which LeStrange applied was funded with federal money or that LeStrange sought employment into a federally funded program. In fact, there is no indication in the decision that the court even considered whether a connection existed between a specific Conrail program supported by Federal financial assistance and the allegedly discriminatory denial of employment to LeStrange. For this reason, this matter should be reversed and remanded to the Third Circuit.

B. The Third Circuit's Adoption Of An "Institutional" Approach To Section 504 Cannot Be Reconciled With The Program-Specific Nature Of The Statute.

The opinion of the Court of Appeals offers no explanation for its failure to consider whether LeStrange was discriminated against in the context of a specific federally funded program. Judge Adams' concurring opinion suggests, however, that the result was compelled, in part, by the Third Circuit's recent decision in *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983)(No. 82-792), where:

> [T]his Court concluded that an entire educational institution is brought within the definition of 'program', and therefore subject to regulation under Title IX, if it receives any federal aid, and that aid is general or indirect and not specifically earmarked for a particular educational function within the institution.

687 F.2d at 777 (Jt.App. at A-52). The assumption implicit in the finding of the court below, in light of Judge Adams' concurrence, is that Conrail's receipt of non-restricted federal funds under §216 of the 3R Act, 45 U.S.C. §726, *see* Affidavit of Richard Semerad (Jt. App. at A-15), subjected Conrail, as an entire company, to regulation under Section 504, because the funds received were not earmarked for a particular program or activity.[21] This implicit assumption is contrary to the "program-specific" language of Section 504, and, by implication, Title VI, as well as the legislative history of those statutes, and the Court's decision in *North Haven*.

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21. The district court expressly found that the federal funds Conrail received for reimbursement for employee protective benefits under Title V of the 3R Act, 45 U.S.C. §§771-780, were unrelated to any allegations of discrimination by LeStrange. The Third Circuit did not criticize, or even discuss this finding. Because the district court did not rule on the relevance of general funds received under §216 of the 3R Act, it is logical to assume that the Third Circuit decision was founded upon this monetary assistance.

1. The legislative history of Section 504 evidences Congressional intent to utilize a "programmatic", rather than "institutional" approach.

Congress intended Section 504 to be interpreted and enforced only in the context of a specific federally funded program in order to avoid the expenditure of federal monies in a discriminatory fashion.

In both the initial Senate report describing the proposed rehabilitation legislation, S. Rep. No. 1135, 92d Cong., 2d Sess., *reprinted in* 118 Cong. Rec. 32281, 32294 (1972), and the final Senate report accompanying the Rehabilitation Act of 1973, S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2123, Section 504 was listed under the heading of "nondiscrimination *under federal grants*." The final Senate report also noted that "[t]he Committee bill . . . prohibits discrimination against qualified handicapped individuals under Federal grants." *Id.*, S. Rep. No. 318, at 18.

This "program specific" focus was underscored by the Senate Report accompanying the 1974 Amendments to the Rehabilitation Act, in which the Senate committee described the purpose of Section 504 "to prevent discrimination against all handicapped individuals . . . *in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally aided programs.*" S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388. This statement clearly indicates a Congressional intent to combat discrimination occurring in the context of specific federally funded activities.[22]

It is well established that Title VI is program-specific. *See North Haven*, 102 S.Ct. at 1926-28; 110 Cong. Rec. 1542, 5253, 5422 (1964). In utilizing language for Section 504 that tracked Section 601 and in

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22. *See also* S. Rep. No. 318, 93rd Cong., 1st Sess. 70, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2143.; S. Rep. No. 1297, 93d Cong., 2d Sess. 39, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6390.

expressly adopting the "remedies, rights and procedures" of Title VI into the Rehabilitation Act, Congress intended that Section 504 contain the program-specific orientation of Title VI. The United States Court of Appeals for the Seventh Circuit reached this conclusion, in affirming the dismissal of an employment discrimination claim on the basis of handicap in *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980). In that case, the court reviewed the language and legislative history of Section 504 and found that:

> The statute does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. . . . To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he would otherwise receive from the program.

Id. at 1232.

The court rejected the plaintiff's claim "since plaintiff has not demonstrated any nexus between his discharge and the federal assistance." *Id. See also Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981).

These decisions, and the legislative history and statutory language of Section 504 upon which they are based, cannot be reconciled with the Third Circuit's assumption, without discussion, that the receipt of non-restricted federal funds automatically subjected Conrail in its entirety to scrutiny under Section 504. The court failed to find that federal funds were actually used in connection with a program or activity under which LeStrange was allegedly subjected to discrimination.

2. The "institutional" approach implicitly applied by the court below under *Grove City* is inconsistent with the "program-specific" nature of Section 504.

The implicit finding of the Court of Appeals that Conrail was subject to the dictates of Section 504 with respect to all of its operations because it received

nonrestricted federal funds is based upon *Grove City*, 687 F.2d at 700-01. The Third Circuit stated that the Court in *North Haven* had "implicitly adopt[ed] an institutional approach to the concept of program." *Id.* at 697.

Under this decision, any institution that receives nonrestricted Federal financial assistance will be subject in its entirety to the dictates of Title IX, and inferentially, Title VI and Section 504. Whether federal funds are actually utilized in connection with the program or activity alleged to be discriminatory would therefore be irrelevant. Such a finding is inconsistent with the well-settled judicial interpretation of these statutes, and will vastly broaden the scope of these statutes, far beyond that intended by Congress.

The reasoning of the Third Circuit in *Grove City* has been rejected by every Court of Appeals that has considered the issue. *See, e.g., Rice v. President & Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982). Moreover, the Department of Justice, the agency responsible for coordinating all federal agency enforcement of Title VI, Title IX and Section 504 has recently stated its disagreement with the Third Circuit's analysis in *Grove City*. In electing not to appeal a federal court decision holding that the mere receipt of nonrestricted federal funds was insufficient to sustain a Title IX claim, *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982), the DOJ stated:

> In light of the clear language of Sections 901 and 902, the accompanying legislative history, and the Supreme Court's recent pronouncement of the intended scope of Title IX coverage, we found *[Univ. of Richmond]* to be both analytically and legally sound. Its conclusion that only those university programs and activities shown to be recipients of federal funds are within the reach of Title IX is fully consistent with the better reasoned judicial precedents in this area. . . .

Letter of Assistant Attorney General Reynolds to Clarence Pendleton, Jr., September 16, 1982 *as reprinted in*

Appendix to Petition for Certiorari in *Grove City v. Bell*, No. 82-792 (Nov. 9, 1982) (A. 135-36). Mr. Reynolds explicitly stated that the Department's position was that Congress had not intended so expansive a definition of "program or activity" as that found by the Third Circuit in *Grove City*. *Id.*

In light of the clear "program-specific" language and legislative history of Section 504, Conrail respectfully submits that the same standard should apply herein as has been consistently applied under Title VI and Title IX. In order to fall within the protection of Section 504, LeStrange must demonstrate a nexus between the denial of employment and a specific program supported by Federal financial assistance. *Simpson v. Reynolds Metals Co.*, 629 F.2d at 1235-37. Where federal funding is not restricted to particular programs, a federal court or agency must examine whether in fact the assistance is utilized in the particular program or activity in which the allegedly discriminatory actions are claimed to have occurred. In this manner, Congress' intent to avoid the expenditure of federal monies to support programs that operate in a discriminatory fashion, may be effectuated. 110 Cong. Rec. 1622-23 (1964) (Rep. Celler); 110 Cong. Rec. 12676 (1964) (Sen. Allott). To ignore this requirement would be to subject an entire institution to liability, a result Congress rejected during legislative consideration of both the Rehabilitation Act and Title VI. *Cf.* 110 Cong. Rec. 5253 (1964) (Sen. Humphrey); 110 Cong. Rec. 7059 (1964) (Sen. Pastore) (Title VI). Because this determination was never made by the court below, Conrail respectfully requests that the decision of the Third Circuit be reversed and remanded.

III. RESPONDENT LESTRANGE DOES NOT HAVE A PRIVATE CAUSE OF ACTION UNDER SECTION 504.

The third question on *certiorari* before the Court is whether a private cause of action exists under Section 504 of the Rehabilitation Act. As stated in the Petition,

this issue was not argued below because it was well-settled in the Third Circuit. Petition at 21. *See NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979). However, this Court has previously reserved decision on the issue, *Southeastern Community College v. Davis*, 442 U.S. at 404 n.5, and it is "squarely presented" here and ripe for resolution. *See Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

This case also presents a subsidiary question of whether a private cause of action for monetary relief exists under Section 504, Rule 21.1(a). Conrail submits that even if a private cause of action can be implied under Section 504, it should be limited to injunctive relief.

A. In The Present Procedural Context Respondent LeStrange Can Seek Only Monetary Relief.

Respondent LeStrange brought this private action under Section 504 seeking both injunctive and monetary relief including reinstatement and backpay. (Jt. App. at A-7). On March 14, 1983, counsel for Respondent informed the Court that Thomas LeStrange died on September 22, 1982, and petitioned for substitution of the administratrix of the estate as a party. Motion For Substitution of Parties Suggesting Death of the Respondent. On April 18, the Court entered an Order substituting Lee Ann LeStrange Darrone as Respondent. Thomas LeStrange's untimely death obviously moots his request for the injunctive relief of reinstatement. *De Funis v. Odegaard*, 416 U.S. 312, 317 (1974); *Hoffman v. Ohio Youth Comm'n*, 13 Fair Empl. Prac. Cas. (BNA) 30 (N.D. Ohio 1975), *aff'd mem.*, 547 F.2d 1167 (6th Cir. 1977). Nonetheless, counsel for Respondent has expressed the intent of the estate to pursue monetary relief of backpay and compensation for medical expenses. Motion for Substitution. ¶4.[23]

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23. Conrail concedes that any private cause of action for monetary relief under Section 504 survives Thomas LeStrange's death. *See Carlson v. Green, supra*. Alternatively, if the Court were to rely upon state survivorship law, Pennsylvania law would permit LeStrange's damage claims to survive. *See* 20 PA. CONS. STAT. ANN.

Because monetary relief is the only remedy available to Respondent, and the only remedy sought, this action is moot unless Section 504 provides for a private cause of action for monetary relief. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 580-81 (1979); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F. Supp. 460, 462 (S.D.Tex. 1982); *Patton v. Dumpson*, 498 F. Supp. 933, 936 (S.D.N.Y. 1980). If the Court should hold that Section 504 does not provide a cause of action for monetary relief, the Court need not reach the broader issue of whether a private cause of action for injunctive relief is available under the provision. *See Guardians Ass'n of N. Y. C. Police Dept. v. Civil Serv. Comm'n*, 633 F.2d 232, 254-63 (2d Cir. 1980) (Meskill, J., concurring), *cert. granted*, 454 U.S. 1140 (1982). In that event, it should find this case moot, vacate the Third Circuit's decision, and remand with a direction to dismiss. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

B. There Is No Private Cause Of Action Under Section 504 Of The Rehabilitation Act For Damages Or Injunctive Relief.

There can be no contention that Section 504 expressly provides a private cause of action because the statute makes no mention of a private cause of action. *See, e.g.*, 45 C.F.R. Part 84, Appendix A, p. 293, no. 8 (1982) (HHS regulations declining to incorporate provision granting Section 504 private cause of action, as the conferral of "such a right is beyond the authority of the executive branch of Government."); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1284 (7th Cir. 1977); *Da-*

NOTE—Continued

§3371 (Purdon 1972); *Gee v. CBS, Inc.*, 471 F. Supp. 600, 613-17 (E.D. Pa.), *aff'd mem.*, 612 F.2d 572 (3d Cir. 1979). Conrail submits however, that LeStrange's death moots any request for broader injunctive relief relating to the enforcement of Section 504 that Respondent may raise if the case is remanded. The estate's claims are derivative and thus, it lacks standing to pursue such injunctive relief. *Cf. Mattis v. Schnarr*, 502 F.2d 588 (8th Cir. 1974); *Ashcroft v. Mattis*, 431 U.S. 171 (1977).

vis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978). Therefore, if a private action is found under Section 504, it is the result of judicial implication.[24]

1. There is no basis in the statute or its legislative history for an implied private cause of action to enforce Section 504.

In several recent decisions, the Court has determined whether an implied cause of action exists to enforce a federal statute. *See Middlesex Cty. Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Universities Research Ass'n, Inc. v. Coutu*, 450 U.S. 754 (1981); *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). These cases indicate that the four factor test announced in the Court's seminal decision in *Cort v. Ash*, 422 U.S. 66 (1975),[25] is a means toward a more fundamental inquiry: Did Congress intend to authorize by implication a private right of action? *See Middlesex Cty. Sewerage Auth. supra*; *Merrill Lynch Pierce Fenner & Smith, Inc. v. Curran*, 50 U.S.L.W. 4457 (U.S. May 3, 1982)(80-203). Application

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24. *See, e.g., Leary v. Crapsey*, 566 F.2d 863 (2d Cir. 1977); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Camenisch v. University of Tex.*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Fed'n v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Jones v. MARTA, supra*; *Kling v. Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Pushkin v. Regents of Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981).

25. This test is (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted, (2) whether there is any indication of legislative intent, explicit or implicit, to deny one, (3) whether an implied private remedy is consistent with the underlying purposes of the legislative scheme, and (4) whether the cause of action is one traditionally relegated to state law, in an area of concern to the states, so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort v. Ash*, 422 U.S. at 78.

of this standard requires the Court to focus on the language and structure of the statute, as well as its legislative history. *See* J. Hurst, *Dealing with Statutes* (1982).

In the present case, the express language and nature of the Rehabilitation Act, the silent legislative history concerning the creation of a private cause of action, and the statutory and administrative enforcement schemes established by the Act, evidence that Congress did not intend the implication of a private cause of action. *See Touche Ross & Co., supra*, and *TAMA, supra*.

a. Section 505 of the Rehabilitation Act expressly identifies the remedies which are available under Section 504 of the Act, and fails to provide for a private cause of action.

The Rehabilitation Act indicates on its face that a private cause of action is not to be implied. Section 505(a)(2), which was added to the Rehabilitation Act in 1978, expressly sets forth the "remedies, procedures, and rights" which are available to aggrieved parties under Section 504, 29 U.S.C. §794a. Thus, there is no need for the Court to look past the statute and infer Congressional intent by evaluating ambiguous and inconclusive opinions held by individual Congressmen or Committees, which may not even be shared by a majority of their respective Houses. As the Court has said, "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *National RR Passenger Corp. v. National Ass'n of RR Passengers*, 414 U.S. 453, 458 (1974), *quoting Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929). *See also TAMA*, 444 U.S. at 17.

Section 505 expressly establishes that a private cause of action under Section 504 can be found to exist only if a private cause of action is *set forth* in Title VI. It is instructive that Section 505(a)(2) does *not* refer to the

"remedies, procedures and rights" which are *created by* or *exist under* Title VI of the Civil Rights Act of 1964. Section 505's specific use of the phrase "set forth in title VI" limits Section 504's remedies, procedures and rights to those rights which are contained in the text of Title VI.[26]

An examination of Title VI makes it abundantly clear that a private cause of action is not a remedy which Congress *set forth* in Title VI.[27] Indeed, the courts which have recognized a private cause of action under Title VI have never done so on the basis that a provision for a private cause of action is set forth in the statute; rather, the courts which have found the existence of such an action uniformly have relied on analyses of legislative history and the purposes underlying the statute, which these courts believed supported judicial implication of a private cause of action. *See, e.g., NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Bossier Parish School Bd v. Lemon*, 370 F.2d 847 (5th Cir.), *cert. denied*, 388 U.S. 911 (1967).

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26. Both the common usage and legal definitions of the term "set forth" indicate that it refers to an express statement, rather than an implication. *See, e.g., American Heritage Dictionary of the English Language* (1980) (defining "set forth" as "to utter or express, as a declaration"); *Union Carbide Corp. v. Borg-Warner Corp.*, 550 F.2d 355, 366 (6th Cir. 1977) (patent declared invalid where patent application did not "set forth" the best mode contemplated for carrying out the invention; court stated, "it would seem that the [information required to be "set forth"] should be fully, clearly, and precisely disclosed if the public is to receive the benefits intended to result from the grant of the patent monopoly."); *Cohen v. United States*, 366 F.2d 363, 368 (9th Cir. 1966), *cert. denied*, 385 U.S. 1035 (1967) (attorney's written note to judge did not "set forth" a requested jury instruction where it merely stated, "I think I forgot to ask for instruction that defendant doesn't have to take stand and can't be held against him, etc." *Id.* at 368 n.2).

27. The present question under Section 504 is distinguishable from the Title IX issue presented in *Cannon v. University of Chic.*, 441 U.S. 677 (1979), because *Cannon* did not involve a statute which expressly stated the available remedies. The words "right[s]" or "remed[ies]" are not even mentioned in any of Title IX's three sections.

b. The legislative history of the Rehabilitation Act and its subsequent amendments do not evidence an intent to create a private cause of action.

The legislative history of the original Rehabilitation Act of 1973 is devoid of any references reflecting a Congressional intent to create a private cause of action under Section 504. An obvious explanation for the omission is that Congress intended Section 504 to be no more than a statement of policy. *See supra*, at pp. 14-17.[28]

The 1974 Amendments did not alter the language of Section 504, and the legislative history of these amendments, like the 1973 history, does not evidence a Congressional intent that a private cause of action be permitted under Section 504. One reference in the 1974 Amendments' legislative history, S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6391, *quoted supra* at 17, if considered out of context, suggests that the Senate Committee intended to support a private cause of action by its interpretation of a provision that had been enacted more than a year earlier.

Assuming *arguendo* that the Report's post-legislation comments are significant, the words "judicial remedy through a private action" when read in context, refer to the right to judicial review of an agency's decision to terminate or continue the federal funding of a program or activity which has allegedly engaged in discriminatory activities. *Lloyd v. Regional Transp. Auth.*, 548 F.2d at 1286. Additionally, the right to judicial review of an agency action to terminate funds is expressly conferred by Section 603 of Title VI and Section 903 of Title IX and

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28. Most of the debate in Congress was over the wide ranging programs created by the 1973 Act and the appropriations which these programs required. *Fisher v. Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 178 (1982); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1094 (5th Cir.) (Goldberg, J., dissenting), *cert. denied*, 449 U.S. 889 (1980).

would be a logical facet of the enforcement scheme suggested by the Report.[29]

In 1978, Congress amended the Rehabilitation Act of 1973 to include Section 505, 29 U.S.C. §794a, which made available the remedies, procedures and rights set forth in Title VI to persons aggrieved under Section 504. Congress thereby expressly established a detailed enforcement procedure and superseded whatever implied enforcement rights previously existed.

Despite the unambiguous language of Section 505(a)(2), several courts have relied upon isolated legislative comments to find that the provision for attorney's fees in Section 505(b)[30] supports a private cause of action under Section 504. *See Garrity v. Gallen*, 522 F. Supp. 171, 211 (D.N.H. 1981); *Fells v. Brooks*, 522 F. Supp. 30, 33 (D.D.C. 1981); *Larry P. v. Riles*, 495 F. Supp. 926, 962 n.73 (N.D. Cal. 1979).[31]

These remarks bear no relation to the legislation enacted by Congress and simply suggest that some members of Congress believed, when the 1978 Amendments were enacted, that a private cause of action *already* existed under Section 504. Nothing in the legislative his-

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29. Alternatively, the Report could have contemplated an independent right of action under 42 U.S.C. §1983. To the extent that the Report suggested a remedy that did not exist, it deserves no credence, as found by the Court in *Southeastern Community College v. Davis*, 442 U.S. at 411 n.11, with regard to the Report's reference to affirmative action obligations under Section 504.

30. Section 505(b), 29 U.S.C. §794a(b), provides that:

> In any action or proceeding to enforce or charge a violation of a provision of [the] subchapter [which includes Section 504] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

31. Examples of such comments are contained in S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978) (*quoting* testimony of Deborah Kaplan); H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312, 7332; 124 Cong. Rec. 15,590 (1978) (Senator Cranston).

tory of the 1978 Amendments, indicates that Congress intended to *create* a private cause of action in 1978.[32] Similarly, subsequent legislative comments in 1979 are entitled to little weight.[33]

The legislative history of the Rehabilitation Act of 1973 and its 1974 and 1978 Amendments does not demonstrate a Congressional intention to create a private cause of action under Section 504. Consequently, under *National RR Passenger Corp.*, *supra*, and *TAMA*, *supra*, the language of the statute controls, and a private cause of action is not available under Section 504.

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32. Indeed, in *Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1082, the court rejected the plaintiff's argument that the 1978 attorney's fees provision created a private right of action under Section 503 of the Rehabilitation Act. After quoting the Senate and House Reports for the 1978 Amendments, the court stated:

> It may, therefore, fairly be said that the 1978 committees of both Houses assumed that a private cause of action had somehow been created in the past. The existence of such a postulate is neither logical nor legislative basis to conclude that the 1973 statute did in fact create the action; and, if the 1973 statute did not authorize the cause of action, the 1978 statute evidences no intention to create one. An assumption is not a law.

33. A report accompanying an unsuccessful legislative proposal to amend Title VII to include handicapped persons stated that it had always been the Senate Committee on Labor and Human Resources' intent that a person aggrieved under the Rehabilitation Act could proceed privately to enforce the rights created by that statute. S. Rep. No. 316, 96th Cong., 1st Sess. 12-13 (1979). In finding this expression of intent non-persuasive, the *Rogers* court said:

> A statement indicating that section 503 creates a private cause of action was made by a Senate Committee in 1979. "The Committee" in 1978 or 1979 is not the committee that recommended the legislation enacted in 1974 [sic]. Had this statement been made in the report of the committee that recommended the legislation, it would indeed be part of the statutory history. When uttered five years later it is mere commentary. Moreover, a committee is not the Congress. It cannot create a Congressional intent that did not exist, or amend a statute by a report.

611 F.2d at 1082. *Cf. Cannon*, 441 U.S. at 687 n.7 (discussion of lower court's holding that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1981, had not created a remedy under Title IX that did not previously exist).

2. An implied private remedy under Section 504 would frustrate the purposes of the Rehabilitation Act.

The detailed provisions of the voluminous Rehabilitation Act, and the precise definition of the various programs and responsibilities of the agencies assigned to administer them, were necessary to Congress' goal of a *coordinated* program. 29 U.S.C. §701. Congress has created a system of checks and balances, involving both the executive and legislative branches, to ensure that the sanctions imposed on a Section 504 violator are not left to an individual plaintiff or judge. With regard to Section 504 administration, Section 505 incorporates the remedies, procedures and rights set forth in Title VI. In turn, Section 602 of Title VI sets out detailed procedures that must be followed before a discriminatory program or activity forfeits federal assistance. *See* Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 GEO. L.J. 1, 36, 38 (1981).

Subsequent to passage of the 1978 Amendments, HEW and DOJ promulgated regulations which require that each Federal department and agency empowered to extend financial assistance issue regulations to implement Section 504 within the department or agency. 28 C.F.R. Part 41 (1982). *See, supra*, at 22 n.19.

As required by 28 C.F.R. Part 41 (1982), the DOT, which is responsible for the federal funds received by Conrail, has promulgated detailed regulations for the implementation of Section 504. 49 C.F.R. Part 27 (1981). These regulations require DOT to ensure that federal grantees comply with Section 504, and authorize remedial action against grantees who have violated Section 504. 49 C.F.R. §27.11(a), (b). Additionally, the responsible official may also recommend to the DOJ that appropriate proceedings be brought to enforce Section 504 or other federal statutes, and may bring an applicable proceeding under state or local law. 49 C.F.R. §27.126. The DOJ and DOT regulations illustrate the comprehensiveness of the administrative remedies set forth in Title VI, and incorporated by Section 505.

The Court has held that it is inappropriate to judicially supplement remedies expressly provided by Congress. *TAMA*, 444 U.S. at 19. It is unlikely that Congress inadvertently failed to provide for a private cause of action under Section 504, when it explicitly adopted a comprehensive administrative enforcement scheme. *See Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs."); *Touche Ross & Co.*, 442 U.S. at 572; *Cannon*, 441 U.S. at 742 (Powell, J., dissenting). It is not the judiciary's role to imply a remedy merely because it, or the executive branch, might believe that such a remedy is desirable.[34]

C. If A Private Cause Of Action Exists Under Section 504, It Is Limited To Injunctive Relief.

Assuming *arguendo* that Section 504 may be enforced by a private party in federal court, such a private cause of action should be limited to injunctive relief.[35] This Court has stated that "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may

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34. Nevertheless, some courts have made policy determinations that the administrative remedies under Section 504 are inadequate to protect individual rights, and therefore, a private action must be implied. *Miener v. State*, 673 F.2d 969, 978 (8th Cir.), *cert. denied*, 103 S.Ct. 215 (1982); *Patton v. Dumpson*, 498 F. Supp. at 941. *See Comment, Compensating the Handicapped: An Approach to Determining the Appropriateness of Damages for Violations of Section 504*, 1981 B.Y.U.L. Rev. 133.

35. The distinction Conrail argues here is between injunctive relief and all forms of monetary relief, whether characterized as legal "damages" or an equitable remedy. It is Petitioner's position that Congress did not intend, nor should the Court imply, any type of monetary recovery under Section 504. In *Ruth Anne M.*, 532 F.

be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979). Neither the language of Section 504 nor its legislative history provide any indication that Congress intended the anti-discrimination provision to be enforced through private lawsuits for monetary damages.

The lower federal courts which have addressed the question of the availability of monetary relief under Section 504 are divided on the issue.[36] In recognition that Section 505(a)(2) of the Rehabilitation Act incorporates

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Supp at 473, the court drew a distinction between "equitable" and "legal" relief, with only the former permitted under Section 504. Such an equitable/legal distinction would still permit certain monetary remedies, such as backpay, which is considered an equitable remedy under Title VII. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In *Guardian's Ass'n*, 633 F. 2d at 255 n.43, Judge Meskill, in his concurring opinion on Title VI, draws a distinction between "compensatory" and "noncompensatory" relief, limiting Title VI recovery to the latter. Petitioner interprets Judge Meskill's distinction as prohibiting certain compensatory injunctive relief under Title VI, as well as all monetary relief. Conrail submits that the monetary/injunctive relief distinction it presents is the most consistent with the Congressional purpose underlying Section 504.

36. A number of courts have found that although a private cause of action can be implied under Section 504, it does not encompass claims for monetary relief. *Calhoun v. Illinois State Bd of Educ.*, 550 F. Supp. 796 (N.D. Ill. 1982); *Carter v. Independent School Dist. No 6*, 550 F. Supp. 172 (W.D. Okla. 1981); *Ruth Anne M., supra.*; *Miener v. State*, 498 F. Supp. 944 (E.D. Mo. 1980), *rev'd*, 673 F.2d 969 (8th Cir.), *cert. denied*, 103 S.Ct. 215 (1982); *Boxall v. Sequoia Union High School Dist.*, 464 F. Supp. 1104 (N.D. Cal. 1979). Other courts have held that Section 504 provides a private action for monetary damages. *Miener v. State*, 673 F.2d 969 (8th Cir. 1982); *Gelman v. Department of Educ.*, 544 F. Supp. 651 (D. Colo. 1982); *Gregg v. Board of Educ.*, 535 F. Supp. 1333 (E.D.N.Y. 1982); *Hutchings v. Erie City & Cty Bd of Dir.*, 516 F. Supp. 1265 (W.D. Pa. 1981); *Patton v. Dumpson*, 498 F. Supp. 933 (S.D.N.Y. 1980); *Poole v. South Plainfield Bd of Educ.*, 490 F. Supp. 948 (D.N.J. 1980). Other courts have simply recognized a cause of action, without deciding the monetary damages issue. *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983); *Pushkin v. Regents of the Univ. of Colo.*, 658 F.2d 1372 (10th Cir. 1981); *Camenisch v. Univ. of Tex*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); *Davis v. Maine Endwell Cent. School Dist.*, 542 F. Supp. 1257 (N.D.N.Y. 1982); *Campbell v. Talladega Cty. Bd. of Educ.*, 518 F. Supp. 47 (N.D. Ala. 1981).

the "remedies, procedures and rights" set forth in Title VI, several courts have looked to Title VI precedent for guidance. *See, e.g., Miener*, 673 F.2d at 978 n.9; *Boxall*, 464 F. Supp. at 1112. Unfortunately, the Title VI case law is also divided on the availability of monetary relief.[37]

While there is a division of authority among the courts that have reached the question whether monetary relief is available in a private action under Section 504 or Title VI[38] it is indisputable that the overwhelming majority of private actions permitted under either statute have been limited to injunctive relief. *See Pushkin*, 658 F.2d at 1377; *Guardians Ass'n*, 633 F.2d at 256 (Meskill, J., concurring).[39]

Those courts which have held that monetary relief is available in private actions under Section 504 and Ti-

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37. A number of courts have rejected Title VI damage claims. *Sumpter v. Harper*, 683 F.2d 106 (4th Cir. 1982); *Drayden v. Needville Indep. Sch. Dist.*, 642 F.2d 129 (5th Cir. 1981); *Concerned Tenants Ass'n of Indian Trails Apts v. Indian Trails Apts.*, 496 F. Supp. 522 (N.D. Ill. 1980); *Rendon v. Utah State Dept. of Empl. Security Job Serv.*, 454 F. Supp. 534 (D. Utah 1978); several courts have found that monetary relief is available, *Guardians Ass'n*, 633 F.2d at 273-75 (Coffrin, J., opinion of the Court on Title VI issue); *Flanagan v. Georgetown Coll.*, 417 F. Supp. 377 (D.D.C. 1976); *Gilliam v. City of Omaha*, 388 F. Supp. 842 (D. Neb.), *aff'd*, 524 F.2d 1013 (8th Cir. 1975); and at least one court has pretermitted the issue. *Chambers v. Omaha Public School Dist.*, 536 F.2d 222, 225 n.2 (8th Cir. 1976).

38. To Respondent's knowledge, the Third Circuit has not addressed the issue of the availability of damages under either Section 504 or Title VI. *Hutchings*, 516 F. Supp. at 1268. In this case, however, it did recognize that some courts have limited private Title VI actions to those for injunctive relief. 687 F.2d at 771 n.2 (Pet. App. at A-8 n.2).

39. The issue of monetary relief has been addressed under Title IX as well. *See Lieberman v. University of Chic.*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982), holding, after *Cannon, supra*, that a private cause of action under Title IX does not encompass compensatory and punitive damages. The district court in *Cannon*, 406 F. Supp 1257, 1259 (N.D. Ill. 1979), indicated that monetary relief would be inappropriate in a private action under Title IX. Neither the Seventh Circuit nor the Court commented upon the monetary relief issue in *Cannon*.

tle VI have adopted similar rationales. Finding no express Congressional intent precluding monetary relief, the courts have invoked *Bell v. Hood*, 327 U.S. 678 (1946), as support for judicial utilization of the "full panoply of remedies," including monetary relief, to further federally created rights.[40] *Hutchings*, 516 F. Supp. at 1268. *See Miener*, 673 F.2d at 977-79; *Patton v. Dumpson*, 498 F. Supp. at 939. The decisions which reject monetary claims under Section 504 and Title VI rely instead on *TAMA*, *supra*. Following that decision, the courts engage in a more detailed examination of Congressional intent as shown by the statutory language, legislative history, and underlying statutory purpose, in order to determine whether it is appropriate to judically imply a private cause action for monetary relief. *See, e.g., Ruth Anne M.*, 532 F. Supp. at 470-73; *Guardians Ass'n*, 633 F.2d at 254-63 (Meskill, J., concurring); *Boxall*, 464 F. Supp. at 1111-12. Conrail maintains that the decisions which limit private actions under Section 504 and Title VI to injunctive relief are the better-reasoned, and should serve the Court as guidance in resolving the issue.

The statutory language of the Rehabilitation Act provides no support for a damages remedy under Section 504. The statute does not expressly provide for an action for monetary relief. *Ruth Anne M.*, 532 F. Supp. at 469. Rather, §505(a)(2) simply incorporates the "remedies, procedures and rights" set forth in Title VI. For the rea-

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40. The principle of plenary remedies of *Bell v. Hood* was developed in the constitutional, not the statutory context, and has been subsequently applied to find direct actions for damages under the Constitution. *See, e.g., Davis v. Passman, supra; Carlson v. Green, supra*. As *Davis* recognized, there is a fundamental difference between implying rights from the Constitution and from Congressional legislation: the courts traditionally have had plenary power to fashion remedies to protect constitutional rights, while statutory implication is controlled by legislative intent. 442 U.S. at 241-42. As some members of the Court have recognized, overzealous judicial implication of private remedies from federal statutes may unconstitutionally project the judiciary into legislative functions. *See, e.g., Cannon*, 441 U.S. at 742-49 (Powell, J., dissenting).

sons stated in section III(B)(2), *supra*, the Court should not find a private action for *damages* where Congress has provided an administrative procedure for remedying federal grantees' non-compliance with Section 504.

It is particularly inappropriate for a court to imply a damage remedy under Section 504 when it is apparent that Congress did not adopt more expansive remedies available to it. *TAMA*, 444 U.S. at 21. The contrast between Section 504 and Title VII is particularly instructive. With Title VII, Congress expressly authorized a backpay remedy and other "equitable relief" with a "make whole" purpose. 42 U.S.C. 2000e-5(a); *Albemarle Paper Co.*, 422 U.S. 405 (1975). Congress not only refused to include handicapped individuals under Title VII, *see*, *supra*., at 19 n. 15, it declined to authorize such remedies under Section 504. See *Ruth Anne M.*, 532 F. Supp. at 471-72. Similarly, Congress declined to adopt the approach of the Education of All Handicapped Children Act of 1973, 20 U.S.C. §1415(e)(2), which authorizes district courts to grant "such relief as the court determines is appropriate." Given the existence of specific and broader damage remedies in statutes closely related to Section 504, it is unlikely that Congress "absentmindedly forgot to mention an intended private action" for monetary relief. *TAMA*, 444 U.S. at 17. Thus the language of the Rehabilitation Act not only fails to support a private action for monetary relief, but suggests Congressional rejection of such a remedy.

As many courts have recognized, the legislative history of the Rehabilitation Act is silent concerning the availability of monetary remedies under Section 504. *Hutchings*, 516 F. Supp. at 1269; *Patton v. Dumpson*, 498 F. Supp. at 939; *Miener*, 498 F. Supp. at 948. The court in *Ruth Anne M.*, *supra*, referred to legislative history suggesting the availability of backpay in a private action under Section 504. 532 F. Supp at 472, *citing* S. Rep. No. 316, 96th Cong., 1st Sess. 12-13 (1979). This legislative statement cited is not part of the legislative history of the Rehabilitation Act, or its amendments. Rather, the statement arose in the context of a failed at-

tempt to amend Title VII to include handicapped persons. *See supra*, at 38 n.33. Such political justificatory language occurring more than 5 years after the enactment of a statute is entitled to little weight. Further, if Congress intended for backpay to be recoverable under Title VI, it could have included such a provision in the 1978 amendments to the Act, but declined to do so.[41] Thus, the statement provides slim support for a private action for damages under Section 504.

The critical aspect of the legislative history of Section 504 is the complete absence of any suggestion of a "make whole" purpose which would support a damage remedy. *Cf. Albemarle Paper Co., supra. See Guardians Ass'n*, 633 F.2d at 259. Conrail submits that if Congress had enacted Section 504 with a compensatory purpose, like Title VII, such purpose would be apparent in the statutory language and the legislative history. *See Albemarle Paper Co.*, 422 U.S. at 419-21. Simply stated, it is not. Thus, the legislative history does not support implying a private action for monetary relief under Section 504.

Most importantly, an implied private action for monetary relief under Section 504 is completely at odds with the underlying purposes of the Act. *Cf. Cannon*, 441 U.S. at 703. The purposes of Section 504, like Title VI, are to prevent the use of federal funds for discrimination, and to protect certain individuals from discriminatory practices. *See Cannon*, 441 U.S. at 704; *Guardians Ass'n*, 633 F.2d at 259; *Drayden*, 642 F.2d at 132; *Lieberman*, 660 F.2d at 1187. These purposes are protected by the administrative remedies under Section

41. It is noteworthy that no court had awarded backpay under Section 504 prior to 1979, and since then, only two courts have found such compensatory relief available. *Hutchings, supra*; *Gelman, supra*. When Congress amended Section 504 in 1978, it incorporated the remedies set forth in Title VI. At that time, only one court had suggested that compensatory backpay was available under Title VI. *Gilliam, supra*. Thus, if Congress initially intended for Section 504 to provide for backpay recovery, it was apparent by 1978 that it was not being so interpreted, and yet Congress' action does not evidence an intent to change the situation.

504, and *arguendo*, actions by "private attorneys general" for injunctive and declaratory relief. *See Rendon*, 454 F. Supp. at 536; *Boxall*, 464 F. Supp. at 1112. But a monetary remedy goes beyond any necessary protection and undermines the general purposes of the Act.

Section 504 is an integral component of a legislative exercise of the Spending Power, by which the Congress provides grants to institutions it deems needy of financial support, many which are in "acute financial distress." *Cf. Lieberman*, 660 F.2d at 1188. It is fundamentally inconsistent with the central purpose of providing financial assistance for a court to impose on grantees a significant financial risk of monetary loss for non-compliance with Section 504, especially in the absence of any Congressional support for the imposition of such liability.

Further, imposing this financial risk of liability on federal grantees is also inconsistent with the purpose of expanding opportunities for the handicapped, *see* 29 U.S.C. §701, because it creates a perverse disincentive to the acceptance of federal funds. *Ruth Anne M.*, 532 F. Supp. at 473; *Miener*, 498 F. Supp. at 948; *Guardians Ass'n*, 633 F.2d at 262; *Lieberman*, 660 F.2d at 1188. The financial risk of liability for compensatory damages to grantees under Section 504 is potentially "massive." *Ruth Anne M.*, 532 F. Supp. at 473. Once courts imply a private cause of action for monetary relief, there is no inherent limitation on such liability. The risk is at least as great as the termination of federal funds under the administrative enforcement of Section 504. Indeed, the ultimate private action liability for non-compliance with Section 504 could exceed the federal funds received. *See Miener*, 498 F.Supp. at 948; *Guardians Ass'n*, 633 F.2d at 262 n.56; *Lieberman*, 660 F.2d at 1188. The result of such "remedial overkill", *id.*, will be that potential grantees will forego federal funding to avoid excessive risk of liability. *Miener*, 498 F. Supp. at 948.

Monetary relief is fundamentally different from injunctive and declaratory remedies. Declaratory and injunctive relief, if found by the Court to be within the

contemplated legislative enforcement scheme, can further the protection of individual rights under Section 504. Conversely the consequential damages sought by plaintiffs under anti-discrimination provisions are often disguised tort suits for attenuated claims of "mental distress," *Rendon v. Utah*, *supra*, *Hutchings*, *supra*, or malpractice, *Sumpter v. Harper*, *supra*.

Courts have attempted to construct limitations on the types of monetary relief recoverable in a private action under Section 504: compensatory, but not punitive damages, *Gelman*, *supra*; "equitable relief" analogous to Title VII, but not compensatory damages, *Ruth Anne M.*, *supra*; no damages when inconsistent with the Education of All Handicapped Children Act, *Calhoun*, *supra*; no damages when calculation difficult, *Campbell*, *supra*. Yet these decisions lack a principled basis for making distinctions among types of monetary relief in the absence of legislative direction.

Given the lack of any express or implied Congressional authorization of a monetary remedy under Section 504, and the inconsistency of such relief with the purposes of the Rehabilitation Act, the Court should hold that there is no private cause of action for monetary relief under Section 504.

CONCLUSION

The decision of the Court of Appeals should be reversed. Should the Court find that Section 504 does not contain a requirement that a primary purpose of the federal financial assistance supplied Conrail be to provide employment, Conrail respectfully requests that the matter be remanded for a determination whether LeStrange has shown a nexus between the denial of employment and a specific program supported by federal funds.

Respectfully submitted,

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Attachment A

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

SECTION 601

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

SECTION 602

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until

the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

SECTION 603

Any department or agency action taken pursuant to section [602] of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section [602] of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of Title 5, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of that chapter.

SECTION 604

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

SECTION 605

Nothing in this subchapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

ATTACHMENT B

Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. §791

Employment of Handicapped Individuals

Interagency Committee on Handicapped Employees; establishment; membership; co-chairmen; availability of other Committee resources; purpose and functions

(a) There is established within the Federal Government an Interagency Committee on Handicapped Employees (hereinafter in this section referred to as the "Committee"), comprised of such members as the President may select, including the following (or their designees whose positions are Executive Level IV or higher): the Chairman of the Civil Service Commission, the Administrator of Veterans' Affairs, and the Secretaries of Labor and Health, Education, and Welfare. The Secretary of Health, Education, and Welfare and the Chairman of the Civil Service Commission shall serve as co-chairmen of the Committee. The resources of the President's Committees on Employment of the Handicapped and on Mental Retardation shall be made fully available to the Committee. It shall be the purpose and function of the Committee (1) to provide a focus for Federal and other employment of handicapped individuals and to review, on a periodic basis, in cooperation with the Civil Service Commission, the adequacy of hiring, placement, and advancement practices with respect to handicapped individuals, by each department, agency,

and instrumentality in the executive branch of Government, and to insure that the special needs of such individuals are being met; and (2) to consult with the Civil Service Commission to assist the Commission to carry out its responsibilities under subsections (b), (c), and (d) of this section. On the basis of such review and consultation, the Committee shall periodically make to the Civil Service Commission such recommendations for legislative and administrative changes as it deems necessary or desirable. The Civil Service Commission shall timely transmit to the appropriate committees of Congress any such recommendations.

Federal agencies; affirmative action program plans

(b) Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Civil Service Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for handicapped individuals.

State agencies; rehabilitated individuals, employment

(c) The Civil Service Commission, after consultation with the Committee, shall develop and recommend to the Secretary for referral to the appropriate State

agencies, policies and procedures which will facilitate the hiring, placement, and advancement in employment of individuals who have received rehabilitation services under State vocational rehabilitation programs, veterans' programs, or any other program for handicapped individuals, including the promotion of job opportunities for such individuals. The Secretary shall encourage such State agencies to adopt and implement such policies and procedures.

Report to Congressional committees

(d) The Civil Service Commission, after consultation with the Committee, shall, on June 30, 1974, and at the end of each subsequent fiscal year, make a complete report to the appropriate committees of the Congress with respect to the practices of and achievements in hiring, placement, and advancement of handicapped individuals by each department, agency, and instrumentality and the effectiveness of the affirmative action programs required by subsection (b) of this section, together with recommendations as to legislation which have been submitted to the Civil Service Commission under subsection (a) of this section, or other appropriate action to insure the adequacy of such practices. Such report shall also include an evaluation by the Committee of the effectiveness of the Civil Service Commission's activities under subsections (b) and (c) of this section.

Federal work experience without pay; non-Federal status

(e) An individual who, as a part of his individualized written rehabilitation program under a State plan approved under this chapter, participates in a program of unpaid work experience in a Federal agency, shall not, by reason thereof, be considered to be a Federal employee, or to be subject to the provisions of law relating to Federal employment, including those relating to hours of work, rates of compensation, leave, unemployment compensation, and Federal employee benefits.

Federal agency cooperation; special consideration for positions on President's Committee on Employment of Handicapped

(f)(1) The Secretary of Labor and the Secretary of Health, Education, and Welfare are authorized and directed to cooperate with the President's Committee on Employment of the Handicapped in carrying out its functions.

(2) In selecting personnel to fill all positions on the President's Committee on Employment of the Handicapped, special consideration shall be given to qualified handicapped individuals.

ATTACHMENT C

Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793

EMPLOYMENT UNDER FEDERAL CONTRACTS

Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for

the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

Administrative enforcement; complaints; investigations; departmental action

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

Waiver by President; national interest special circumstances for waiver of particular agreements

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.

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No. 82-862

In the Supreme Court of the United States

October Term, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LE STRANGE DARRONE, Administratrix of the Estate of Thomas LeStrange,
Respondent

On Writ Of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does a private right of action exist under section 504 of the Rehabilitation Act of 1973?

2. In a private action under section 504, may an injured plaintiff recover monetary relief?

3. Does section 504 forbid a recipient of federal assistance to discriminate in employment on the basis of handicap where a primary objective of that assistance is not to provide employment?

4. Under what circumstances does discrimination constitute "exclu[sion] from ... participation in ... deni[al] [of] the

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A complete list of the parties to the proceeding in the court below is contained in the caption of the case in this Court. A listing of all subsidiaries (except wholly owned subsidiaries) and affiliates of Petitioner Consolidated Rail Corporation has been included within the Petition for a Writ of Certiorari, at ii.

benefits of, or ... discrimination under any program or activity receiving Federal financial assistance" within the meaning of section 504?

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STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved in this case are sections 504 and 505 of the Rehabilitation Act and sections 601 and 604 of Title VI of the 1964 Civil Rights Act. The regulations involved are 49 C.F.R. part 27. Both the statutes and the pertinent regulations are set out in an appendix to this brief.

SUMMARY OF ARGUMENT

I. This Court has held that there is a private right of action under both 601 of the Civil Rights Act of 1964 and section 901 of the Education Amendments of 1972. Guardians Association v. Civil Service Commission, 51 U.S.L.W. 5105 (1983); Cannon v. University of Chicago, 441 U.S. 677 (1979). Since section 504 is substantially identical to sections 601 and 901, Guardians and Cannon compel the conclusion that a similar

right of action exists under section 504.

II.(1) In Guardians Justice O'Connor and four other members of the Court held that compensatory injunctive relief was available for a violation of Title VI. This Court has repeatedly recognized that awards of back pay are within the scope of an equitable decree. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

(2) Plaintiff in this action seeks damages for intentional discrimination on the basis of handicap. The prospect of such awards is necessary to provide an incentive for federal grantees to comply with section 504. Had Congress wanted to prohibit damages under section 504 it would have done so expressly; such an explicit limitation was in fact contained in another portion of the 1978 Rehabilitation Act Amendments.

III. (1) Conrail's practices are subject to 27.31(a)(i) of the Department of Transportation regulations, which forbids discrimination on the basis of handicap in all federally assisted programs, regardless of whether providing employment is a primary objective. Twenty-five other agencies have similar regulations, which stem from an HEW section 504 regulation first promulgated in 1974.

(2) Section 504 prohibits discrimination in the same broad language which this court held applicable to employment in North Haven Board of Education v. Bell, 456 U.S. 512 (1982). The 1973 Senate Report accompanying section 504 expressly referred to the problem of employment discrimination. S. Rep. No. 93-318, 93rd Cong., 1st Sess., p. 4. Senator Williams explained that the 1973 Act contained "prohibitions against discrimination in employment in programs

assisted with federal funds." 119 Cong. Rec. 24588 (1973).

(3) Petitioner relies on a 1974 Senate Report stating that section 504 was "patterned after" section 601 of the 1964 Civil Rights Act. But that report states that section 504 was also patterned after section 901 of the Education Amendments of 1972, which North Haven held generally prohibits discrimination in employment.

(4) In 1978 Congress enacted section 505(a)(2), which provides that "the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by" a violation of section 504. The accompanying Senate Report explained that this provision was adopted merely to codify that portion of the HEW section 504 regulations which incorporated by reference the Title VI

administrative procedures. S. Rep. No. 95-890, 95th Cong., 2d Sess., 18.

IV. Conrail has received $3.2 billion under the Rail Reorganization Act of 1973. The "program" assisted by these funds includes all activities for which the funds could have been used by Conrail. Salaries of engineers such as LeStrange and other employees are among the purposes for which that federal assistance could be used. Respondent need not prove whether Conrail in fact chose to use federal dollars for the particular position from which Le Strange was excluded, since section 504 is "programspecific", not "job-specific."

ARGUMENT

I. SECTION 504 CREATES A CAUSE OF ACTION ON BEHALF OF HANDICAPPED INDIVIDUALS DISCRIMINATED AGAINST BY FEDERAL GRANTEES

The question of whether section 504

can be enforced through a private action is controlled by this Court's decisions in Cannon v. University of Chicago, 441 U.S. 677 (1979), and Guardians Association v. Civil Service Commission, 51 U.S.L.W. 5105 (1983). Section 504 was expressly patterned after the similar language of section 601 of the Civil Rights Act of 1964 and section 901 of the Education Amendments of 1972. In Cannon this Court held that Title IX creates a private cause of action. In Guardians a majority of the Court[1/] reached a similar conclusion regarding Title VI. This construction of Title VI was well established in the lower courts by 1973 when section 504 was enacted. Cannon v. University of Chicago, 441 U.S. at 696-98. This Court's exhaustive analysis of this issue in Cannon,

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1/ Opinions of Justice White (joined by Justice Rhenquist), Justice Stevens (joined by Justices Brennan, Blackmun, and O'Connor) and Justice Marshall.

and the application there of the standards in Cort v. Ash, 422 U.S. 66 (1975), is largely applicable to the instant case. All eight circuits which have considered this question have held that section 504 creates a private cause of action.[2/]

Petitioner urges this Court to hold that section 504 creates no private right of action because it allegedly establishes no obligations or duties at all on the part of recipients of federal assistance, but is "no more than a statement of policy."

2/ Miener v. State, 673 F.2d 969 (8th Cir.), cert. denied. ___ U.S. ___, 103 S.Ct. 215 (1982); Pushkin v. Regents of the University of Colorado, 659 F.2d 1372 (10th Cir. 1981); Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980); Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390 (1981); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); Rampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Lloyd v. Regional Transp. Auth., 548 F.2d 1277 (7th Cir. 1977).

(Br. 36). If this were correct, it would also preclude action on the part of any federal agency to correct discrimination on the basis of handicap in the federal programs which it administers. Petitioner relies for this surprising conclusion on the following passage in the 1974 Senate report:

> [S]ection [504] ... constitutes the establishment of a broad government policy that programs receiving federal financial assistance shall be operated without discrimination on the basis of handicap. S. Rep. No. 1135, 92nd Cong., 2d Sess., 39.

But the language immediately following the quoted portion of the Senate report makes clear that Congress did intend section 504 to create enforceable obligations:

> It does not specifically require the issuance of regulations or expressly provide for enforcement procedures, but it is clearly mandatory in form, and such regulations and enforcement are intended. Id. at 39-40.

The report further explained that Congress

envisioned that section 504 would be implemented in a manner "similar to" Title VI and Title IX.

> This approach to implementation of section 504 ... would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the federal government as well as relative ease of implementation and permit a judicial remedy through a private action. Id. at 40 (emphasis added).

The words "judicial remedy through a private action" must refer to a private right of action, since judicial review of contested agency action is mentioned earlier in the sentence.

Petitioner also urges that Congress cannot have intended to permit private enforcement of section 504 because section 505(a)(2) expressly authorizes resort to Title VI "remedies, procedures and rights"; petitioner argues that these Title VI remedies do not include a private right of action, and that the courts "shall not

expand the coverage of the statute to subsume other remedies." (Br. 34). Since section 504 was adopted in 1973 and section 505(a)(2) was not enacted until 1978, petitioner is urging that section 505(a)(2) was adopted to partially repeal section 504 and to rescind the right of private action that was widely recognized by the lower courts prior to 1978. See n.2, supra.

Such a construction of section 505(a)(2) is precluded by the terms of section 505(b), which provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Both the House[3/] and Senate reports make clear that subsection (b) was adopted to provide counsel fees for handicapped

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3/ H. Rep. No. 95-1149, 95th Cong., 2d Sess., 21 (1978).

individuals who enforced section 504 through private litigation. The Senate report, which is of particular importance since it accompanied section 505(a)(2) as well as 505(b), explained:

> The committee believes that the rights extended under title V, that is ... nondiscrimination under Federal grants -- are, and will remain, in need of constant vigilance to assure compliance, and the availability of attorneys' fees should assist in vindicating private rights of action in ... cases .. arising under section ... 504. 4/

The importance of counsel fees to facilitate private enforcement of section 504 was also stressed on the Senate floor. 5/ Congress would not have provided in subsection (b) for counsel fees in private enforcement actions if such actions were to have

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4/ S. Rep. No. 95-890, 95th Cong., 2d Sess., 10.

5/ 124 Cong. Rec. 30346 (remarks of Sen. Cranston), 37507 (remarks of Sen. Stafford).

been precluded by subsection (a)(2). Petitioner's argument that section 505(a)(2) forbids any private cause of action also necessarily assumes that Congress believed that such lawsuits were not authorized under Title VI. But Senator Cranston, the author of section 505(a)(2) and the floor manager of the 1978 amendments, indicated otherwise in a colloquy with Senator Bayh. 124 Cong. Rec. 30349 (1978).

Had Congress in 1978 abolished the then well established private right of action, it would have left disabled individuals aggrieved by a violation of section 504 no relief other than recourse to the federal agency which had provided the grant involved. But the most consistent theme in the four years of congressional oversight of section 504 which led to the 1978 amendments had been the failure of those

agencies to enforce it vigorously, if at all. See pp. 79-80, 94-96, infra. A Government Accounting Office study concluded that most federal agencies had taken no action to implement section 504.[6/] The Department of Health, Education, and Welfare, the agency primarily responsible for assuring administrative enforcement of section 504, conceded it was unable to do so. In 1975 HEW's Office for Civil Rights reported that it had become "increasingly difficult to adhere to the assurance in substantive regulations of prompt investi-

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6/ Hearings on Review of Programs for the Handicapped, 1977, before the Subcommittee on the Handicapped of the Senate Committee on Human Resources, 95th Cong., 1st Sess., 1130 (1977) (hereinafter cited as "1977 Senate Hearings"); Hearings on Rehabilitation of the Handicapped Programs, 1976, before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 2d Sess., 322 (1976) (hereinafter cited as "1976 Senate Hearings").

gation of each [discrimination] complaint ...." 40 Fed. Reg. 24148. The next year HEW noted that there had been an "astronomical growth" in the number of complaints it was required to process, and that "these increases have not permitted the office to keep pace with the rising volume of complaints received." 41 Red. Reg. 18394. OCR believed that even with increased staff it would be impossible "simultaneously to eliminate the complaints on a timely basis, and to fulfill other essential enforcement responsibilities." Id. at 18394. In 1977 the OCR director, David Tatel, urged Congress to retain the private right of action under section 504 precisely because the department was simply unable to handle effectively the increasing volume of administrative complaints.[7/] Tatel

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7/ Hearings on Implementation of Section 504, Rehabilitation Act of 1973, before the

noted that while the number of complaints filed under section 504 was accelerating, his office was understaffed, and that a backlog of several thousand unprocessed discrimination charges thus existed.[8/] Representative Jeffords commented that no one "could conceive of" requiring exhaustion of administrative remedies in light of that backlog and the understaffing at OCR.[9/] It is equally inconceivable that Congress, which was all too aware of these problems, could have intended to require aggrieved individuals to resort to this

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7/ continued

Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess., p. 358. (1977) (hereinafter cited as "1977 House Hearings").

8/ 1977 House Hearings 341; see also id. at 302-05.

9/ 1977 House Hearings 276.

backlogged and ineffective administrative process instead of, or prior to,[10/] seeking redress in the courts.

II. MONETARY RELIEF MAY BE AWARDED IN PRIVATE ACTIONS TO REDRESS VIOLATIONS OF SECTION 504

In Guardians Association v. Civil Service Commission, 51 U.S.L.W. 5105 (1983), five members of the Court held that compen-

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10/ The section 504 administrative procedures are identical to those under Title IX, which this Court has already held are so limited that it would be inappropriate to insist they be used prior to filing suit. Cannon v. University of Chicago, 441 U.S. at 708-09 n.41. The United States itself opposed any exhaustion requirement in section 504 cases in its amicus brief in Southeastern Community College v. Davis, 442 U.S. 397 (1979).

In the instant case, of course, there were no administrative procedures to exhaust when respondent's claim arose. LeStrange filed this action on September 22, 1978. The Department of Transportation did not issue regulations implementing section 504 until May 31, 1979. See LeStrange v. Consolidated Rail Corp., 501 F. Supp. 964, 969-70 and n.5 (M.D. Pa. 1980).

satory injunctive relief could be awarded to redress a violation of Title VI of the 1964 Civil Rights Act. 51 U.S.L.W. at 5113 (O'Connor, J., concurring), 5114 (Marshall, J., dissenting), 5120 (Stevens, J., dissenting). Four members concluded that damages could be awarded for any illegal discrimination, 51 U.S.L.W. at 5114 (Marshall, J., dissenting), 5120 (Stevens, J., dissenting), and two others indicated such relief might be available to redress an act of intentional discrimination. 51 U.S.L.W. at 5109 (White, J.).

We contend, first, that back pay has traditionally been regarded as an equitable remedy, and that the availability of back pay relief is thus supported by the majority view in Guardians as well as by the legislative history of section 504. Second, we note that the complaint in this action alleges intentional discrimination on the

basis of handicap, and urge the Court to hold that damages may be awarded under section 504 for such intentional discrimination. Because of the nature of those allegations, there is no need to consider in this case whether different considerations might apply to a claim for damages to redress injuries caused by a practice or policy which merely had the effect of discriminating on the basis of disability.

(1) Back Pay

This Court has repeatedly recognized that the district courts "enjoy[] the 'historic power of equity' to award lost wages to workmen unlawfully discriminated against...." Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). In Mitchell v. DeMario Jewelry, 361 U.S. 288, 292-95 (1960) this Court relied on that power to uphold the authority of the district courts to order back pay for employees

unlawfully dismissed in retaliation for having instituted proceedings under the Fair Labor Standards Act. Albemarle Paper Co. recognized that the authority of the federal courts to award back pay under Title VII of the 1964 Civil Rights Act fell within that equitable power. 422 U.S. at 413-425. Curtis v. Loether, 415 U.S. 189, 197 (1974), noted that Title VII back pay awards were widely regarded as "an integral part of an equitable remedy, a form of restitution".

These decisions recognize that back pay awards fall within the traditional equitable power of the courts because they require a defendant "to disgorge funds wrongfully withheld from the plaintiff". Curtis v. Loether, 415 U.S at 197. An employer which has engaged in unlawful discrimination "cannot be heard to assert that wages are ordered to be paid for

services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of their opportunity to render services." Mitchell v. DeMario Jewelry, 361 U.S at 293. Such awards are also "appropriate and necessary to enforce compliance with" the underlying statute since the prospect of having to provide reimbursement for wages unlawfully withheld provides an incentive to obey the law in the first instance. Porter v. Warner Holding Co., 328 U.S. 395, 400 (1946).

The traditional equitable power to award back pay "is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words ... restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." Porter v. Warner Holding Co.,

328 U.S. 395, 398 (1946). No such restriction can be found in the language of section 504. The legislative history of that provision demonstrates that Congress fully intended to authorize back pay awards in cases of employment discrimination. In 1978 Senator McClure offered an amendment concerning section 501 that would have forbidden in actions alleging employment discrimination by the federal government "equitable relief .. disproportionately exceeding actual damages in the case." 124 Cong. Rec. 30576 (1978). Although Senator McClure emphasized that his proposal "would not in any way limit the actual damages which could be recovered," ibid., his amendment was successfully opposed by the managers of the bill.[11/] Senator Cranston argued that

11/ Section 505(b)(1) allows a court in framing an injunction to consider the cost

federal employees were entitled to the same rights as employees of federal grantees, and added:

> An individual denied a job, an advancement, or promotion on the basis of handicap is a person entitled to the same remedies as a person discriminated against unlawfully on the grounds of any other factor. 124 Cong. Rec. 30578.

The remedies available to victims of discrimination on the basis of other factors--specifically race, national origin, sex and religion--include back pay under Title VII. It is inconceivable that Senator Cranston could have made this argument had he believed that such monetary relief was not available to victims of discrimination on the basis of handicap

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11/ continued

of any workplace accommodation. Senator Cranston correctly described this as merely stating what any "reasonable court" could do even in the absence of an express authorization. 124 Cong. Rec. 30579.

just as it was for victims of other forms of employment discrimination. In 1979, a report of the Senate Committee which had drafted sections 504 and 505 emphasized that:

> It is and always has been the Committee's intent that any handicapped individual aggrieved by a violation of title V has the right under existing law ... to receive back pay. 12/

There is no reason to question the accuracy of the Committee's description of its views of only a year before.

(2) Damages

Should this Court conclude that back pay is not within the equitable power of the federal courts, we would urge that compensatory damages, including damages for lost wages, may be awarded for a violation of section 504.

12/ S. Rep. No. 96-316, 96th Cong., 1st Sess., 12-13 (1979).

The complaint in this section claimed that Conrail had "purposely" refused to permit the plaintiff to return to work because of his handicap, A-8, and despite the fact that he was "at all times ready, willing, and able to work as an engineer." A-6. It specifically asserted that Conrail ignored medical reports that concluded plaintiff was capable of resuming work. A-8. These allegations, if true, constitute precisely the type of discriminatory intent with which section 504 is concerned.[13/] Congress understood that disabled individuals were frequently excluded from employment under, or other participation in, federally assisted programs, not out of malice, but because of

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13/ Section 504 also forbids under certain circumstances conduct by federal grantees which has the effect of discriminating on the basis of handicap. See 49 C.F.R. § 27.7(a)(4)(i).

unfounded preconceptions and stereotypes about their abilities. See pp. 63-68, infra. Those all too common attitudes towards handicapped persons are described in detail in the amicus brief in this case filed on behalf of the American Council of the Blind. Congress enacted section 504, inter alia, to compel recipients of federal assistance to put aside such preconceptions and to accord to "otherwise qualified" handicapped individuals a meaningful equal opportunity to participate in or enjoy the benefits of federally assisted activities. The statute puts recipients on notice that when they act on the basis of handicap they face liablity for a violation of the law if the person or persons affected were in fact qualified for the program or job at issue.

Federal regulations implementing section 504 expressly direct recipients of federal assistance to reevaluate their

policies and practices and to modify those that do not meet the requirements of section 504. 45 C.F.R. § 84.6(c); 49 C.F.R. § 27.12(c). A grantee can, prior to accepting federal assistance, bring to the attention of the granting agency any practices about whose legality it may be in doubt, and "the appropriate federal official will determine whether the grantee's plan, proposal or program will satisfy the condition of the grant ... and the grantee will [thus] have in mind what its obligations will be." Guardians Association v. Civil Service Commission, 51 U.S.L.W. at 5109. (Opinion of Justice White). If a question about such a practice arises after the grant has been accepted, the grantee can call it to the attention of the appropriate federal official and is entitled to a "prompt investigation" of whether that practice would

constitute a violation of section 504. 45 C.F.R. § 80.7(c); 49 C.F.R. § 27.123(c).

The prospect of damage awards serves to induce compliance with both section 504 and the regulations. What this Court has said of Title VII is equally true of section 504. In the case of discrimination in employment, as in other areas:

> [T]he primary legislative objective was a prophylactic one.
>
> "It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. ..."
>
> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and self-evaluate their employment practices, and to endeavor to eliminate, so far

> as possible, the last vestiges of an unfortunate and ignominious page of this country's history.

Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975). The prospect of damages serves a similar purpose. It may be, as Justice White noted in Guardians, that a federal grantee will not necessarily know prior to such self-examination whether its employment criteria, program entrance qualifications, or architecture have the effect of excluding the disabled, but without the prospect of retrospective relief such a grantee has no incentive to make that inquiries or to correct the arguable violations they may reveal.

The congressional direction that handicapped individuals receive the same treatment as others benefitting from a federally assisted program can often be achieved, partially if not fully, on a retrospective basis. Compensatory injunc-

tive relief represents a delayed method of providing the victims of discrimination with the same benefits or status that Congress intended that they be afforded at an earlier time. Where non-handicapped students at a school are given a particular form of training, section 504 ordinarily requires that it be provided to disabled students as well. That statutory command is equally applicable to and implemented by the voluntary act of a school admitting handicapped students or by a subsequent court order directing that they be given the instruction that was earlier denied them. An award of damages frequently serves precisely the same "make equal" function. If a disabled employee does the same work for which able-bodied colleagues are paid $100, section 504 directs that the handicapped worker also receive $100. That statutory command is equally implemented

whether the disabled worker receives the $100 as a result of the voluntary act of the employer or due to a court ordered award of damages.

A remedial rule which allowed compensatory injunctive relief but excluded compensatory monetary relief would make little practical sense under Title VI or section 504. If only compensatory injunctive relief were permitted, the victims who could and could not obtain effective redress for a Title VI or section 504 would be determined in an entirely capricious manner. A student illegally excluded from a public school could get relief if he or she sought no other education and waited for an injunction ordering remedial training, but not if he or she went to a private school after that rejection and subsequently sought reimbursement for the tuition. The deterrent effect would be

equally uneven and unpredictable. A grantee which found compliance with section 504 inconvenient or expensive, and which knew that all the injuries caused by its disobedience will be financial and thus incapable of redress, would have every reason to violate the law. In the absence of retrospective relief, section 504 would often be merely precatory; not until the immposition of an injunction or agency order backed by a threat of sanctions would many grantees have any compelling motivation to comply with its commands. Thus, wholly aside from the normal assumption that Congress intended that federal courts have the authority to redress violations of any federal statute, the obvious congressional desire that federal grantees actually comply with the provisions of section 504 compels the conclusion that Congress contemplated that there would be retrospec-

tive monetary relief for such violations.

The unavailability of monetary relief would result in difficult practical and administrative problems for the federal courts. In an ordinary case in which a plaintiff is complaining about the denial of employment or some other act causing economic harm, the additional losses which may occur following the commencement of the action may be corrected at the end of the litigation through an award of damages. To forbid monetary awards would be to transform ordinary financial losses into irreparable injuries. Such a prohibition would thus force the district courts at the very outset of a section 504 case to choose between granting preliminary injunctive relief, and running the risk of placing an unqualified participant or employee in a federally assisted program, or denying the relief, and thus rendering irrevocable what

might later prove to be a serious violation of federal law. Neither the orderly administration of justice nor the legitimate interests of the parties would be served by so restricting the traditional authority of federal judges to manage litigation before them, and there is no indication that Congress intended to impose on the federal courts such a limited and awkward set of alternatives.

This conclusion regarding the scope cance of section 504 is confirmed by other language of the 1978 Senate bill. Section 104 of that measure accorded to handicapped individuals the right to an administrative hearing to review rehabilitation plans prepared for them by state agencies, and, if the plans were upheld, to challenge them in federal court. Subsection 104(f), however, expressly provided "No civil action may be brought under this

section for monetary damages." 124 Cong. Rec. 30293 (1978); see also id. at 30315 (remarks of Sen. Javits). The failure of Congress to include any similar language in the portion of the bill containing section 505(a)(2) can only be understood as indicating the absence of any intention to oppose such a limitation on relief in section 504 cases.[14/]

Justice White's opinion in Guardians Association, however, asserts that under Pennhurst State School v. Halderman, 451 U.S 1 (1981), there is a "presumption" that in an action to enforce Spending Clause legislation private litigants are entitled to no relief other than a prospective

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14/ The conference committee replaced the civil action authorized by section 104 with a right of review by the Secretary of HEW, and subsection (f) was thus eliminated as irrelevant. H. Conf. Rep. No. 95-1780, 95th Cong., 1st Sess., 68-69 (1978).

injunction compelling grantees to comply with the conditions of federal assistance if they chose to continue receiving it. 51 U.S.L.W. at 5109-10. This is not an accurate description of the majority opinion, of Justice White's dissent, or even of the issue presented in Pennhurst. The plaintiff in that case sought in this Court only to "compel compliance with" certain conditions imposed by statute on grants under the Developmentally Disabled Assistance Act. 451 U.S. at 27. The remedial question was whether such compulsion should take the form of an order enjoining federal authorities from providing funds to the grantee if the conditions were not met, or an order directed at the grantee itself requiring compliance. The majority in Pennhurst noted that the former approach was taken in Rosado v. Wyman, 397 U.S. 420 (1970), but that "[i]n other cases

... we have implicitly departed from that rule," 451 U.S at 29, and remanded the question to the court of appeals. Id. at 30. Justice White would have held that prospective relief to enforce the conditions of federal grants should be limited to the type of injunction approved in Rosado, since "the State may terminate such statutory obligations, except those already accrued, by withdrawing from the program and terminating its receipt of federal funds." 451 U.S. at 53 (emphasis added). But as the underscored language makes clear, Justice White himself recognized that a state could not by merely withdrawing from a federal program escape from or alter the obligations that were created by its earlier acceptance of federal funds.

Justice White noted in Guardians with regard to Title VI:

> the possibility that Congress may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs. 51 U.S.L.W. at 5111 n.24.

But the legislative history of section 504 contains not a single reference to any such concern. No witness or member of Congress ever mentioned any federal grantee ever having rejected or even considered rejecting federal aid because of the danger of a compensatory award. And nowhere in the thousands of pages of hearings, reports and debates on the vocational rehabilitation legislation of 1973, 1974 and 1978 is there the slightest suggestion that Congress ought to or had restricted the traditional remedies available for violations of federal law in order to reassure squeamish applicants for federal aid.

Back pay and damages are among the forms of relief normally available to the

victim of a violation of federal law, regardless of the motivation of the law-breaker. Nothing in the language or legislative history of section 504 even hints at a congressional desire to depart from that traditional rule, or to shift the cost of such violations from grantees receiving millions or even billions of dollars in federal aid to physically and mentally handicapped individuals who may be unable to protect their interests. To deny monetary relief under section 504 would often be to postpone until the entry of a final court injunction the implementation of legal rights adopted a decade ago for men and women who had already endured "hundreds of years of being alienated, degraded, insulated and otherwise ignored by society. ..." 124 Cong. Rec. 30578 (1978) (remarks of Sen. Stafford). Such a scheme would, as Senator Cranston said of

the rejected McClure amendment, provide "half-remedies for whole wrongs." Ibid.

III. SECTION 504 PROHIBITS EMPLOYMENT DISCRIMINATION UNDER ALL FEDERALLY ASSISTED PROGRAMS

The contention advanced by Conrail in this case is far more radical than that already rejected by this Court in North Haven Board of Education v. Bell, 456 U.S. 512 (1982). In North Haven the petitioners conceded that employment discrimination on the basis of sex was illegal; they asserted no right to fire, demote, or harass female employees because they were women, but merely argued that such mistreatment, admittedly forbidden by Title VII of the 1964 Civil Rights Act and other laws, was not also covered by Title IX of

the Education Amendments of 1972.[15/] In the instant case Conrail contends that neither an aggrieved individual nor any federal agency[16/] is authorized to take any action to prevent or redress employment discrimination on the basis of handicap in a federally assisted program except where providing employment was one of the primary objectives of that program. If that argument is sustained, Conrail would be

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15/ "A holding that § 901 does not prohibit employment discrimination will not sanction such discrimination. Rather, employment discrimination will be remedied by resort to Title VII, the Equal Pay Act [and] the post-Civil War civil rights statutes, 42 U.S.C. § 1983...." Brief for Petitioners, No. 80-986, p. 109.

16/ Br. 22, 23. Petitioner's argument against any private action to remedy such discrimination is premised in part on the assumption that federal agencies are powerless to take such action, and that Congress cannot have intended to "invest individuals with substantive rights broader than ... those subject to agency definition, administration, and enforcement." Br. 10.

free to refuse to hire an attorney because he or she had a bad back, to pay a ticket clerk less because he or she used a cane, or to fire a baggage handler because he or she used a hearing aid. One decision relied on by petitioner actually holds that a school can even discriminate against handicapped instructors in hiring teachers for handicapped children.[17/] The issue raised by petitioner is thus not how Congress intended to enforce a prohibition against employment discrimination on the basis of handicap by federal grantees, but whether Congress intended, save in one small category of cases, to permit the disabled to be barred from jobs in federally funded programs, regardless of their

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17/ Sabol v. Board of Education of Willingboro, 510 F. Supp. 892 (D.N.J. 1981) cited at Brief for Petitioner, p. 7, n.4.

actual qualifications, because of nothing more than stereotypes, fears, or unfounded preconceptions about physical or mental disabilities.

If the coverage of section 504 is limited to employees in federal programs whose primary objective is to create jobs, the reduction in the number of workers protected by that law would, as petitioner acknowledges, be "dramatic."[18/] An analysis prepared in 1976 for the Department of Health, Education and Welfare estimated that section 504, if applied to all federal grantees, would affect more than a million disabled workers.[19/] That Department alone provided funds for more than 36,000 programs and activities.[20/] Only a handful of

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18/ Petition, p. 13.

19/ 41 Fed. Reg. 20312, 20323 (1976).

20/ 1977 House Hearings 299, 358.

these employees and programs would be covered if the application of section 504 were restricted to programs whose primary purpose was to provide employment. The practical effect of such a restriction on the effectiveness of section 504 as a whole would be particularly great because of the frequency and importance of employment discrimination against the disabled. Employment discrimination has consistently been the most common subject of administrative complaints filed with federal officials under section 504; in 1977, for example, 70% of all the section 504 complaints received by HEW concerned employment problems.[21/] Thus any construction of section 504 that sharply limited its application to employment discrimination

21/ 1977 House Hearings 303, 317, 318, 341; see also 1976 Senate Hearings 1500.

would reduce dramatically its overall impact on the problems of handicapped individuals.

(1) The Department of Transportation Regulations

This action was commenced on September 22, 1978. Eight months later[22/] the Department of Transportation adopted regulations under section 504 applicable to Conrail and other recipients of funds administered by DOT. Section 27.31(a)(1) of those regulations provides:

> No qualified handicapped applicant for employment, or an employee shall, on the basis of handicap, be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance.

This regulation is not limited to discrimination under a federal program whose primary objective is employment, but

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22/ 44 Fed. Reg. 31442 (1979). The regulations are now contained in 49 C.F.R. part 27.

deliberately[23] and without exception applies to all federally assisted programs.

Section 27.31, if valid, is dispositive of this aspect of this litigation. As the Court has repeatedly held, "a court is to apply the law in effect at the time it renders its decisions, unless doing so would result in manifest injustice...." Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974).[24] Section 27.31, although not discussed by the courts below, has been in effect throughout most of the five years that this

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23/ As we note, infra, pp. 47-52, Executive Order 11914 required that the DOT regulations comport with guidelines established by HEW, which in turn require non-discrimination in employment regardless of the purpose of the federally assisted activity. See 44 Fed. Reg. 31442.

24/ Since section 27.31 merely reiterated for DOT grantees the long established HEW construction of section 504, its application to events occurring prior to its issuance in May, 1979, is clearly not unjust.

action has been pending.

In addition to DOT, twenty-five other federal agencies[25/] have promulgated virtually identical regulations forbidding employment discrimination on the basis of handicap in all federally assisted programs. This widespread and uniform construction of section 504 derives from the interpretation long given to the statute by the Department of Health Education and Welfare. In 1976 Executive Order 11914, 41 Fed. Reg. 17871, gave HEW primary responsibility for co-ordinating administrative implementation of section 504, and required DOT and all other federal agencies to issue section 504 regulations "consistent with" the standards formulated by HEW.[26/]

25/ See Brief for United States as Amicus Curiae Supporting Respondent, p. 2 n.2.

26/ This authority was transferred to the Department of Justice by Executive Order 12250, 45 Fed. Reg. 72995 (1982). That

HEW's construction of section 504, insofar as that provision applies to employment discrimination, has been consistent and longstanding. The first HEW regulation was promulgated in June, 1974, nine months after enactment of section 504. The rules issued on that date revised pre-existing provisions concerning vocational rehabilitation programs in order "to implement the provisions of the Rehabilitation Act of 1973." 39 Fed. Reg. 18562 (1974). Section 402.24, entitled "Nondiscrimination for reason of handicapping condition," provided:

> No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any program, project or activity

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26/ continued

Department, however, also construes section 504 to apply to employment discrimination in all federally assisted programs. See pp. 54-55, infra.

> supported under this part. No qualified individual shall be denied employment in any program, project, or activity supported under this part solely because of a physical or mental disability. 39 Fed. Reg. 18582 (1974) (emphasis added).

Thus the regulations forbad employment discrimination in all such programs despite the fact that providing employment was not a primary objective of the programs covered by those regulations.[27/]

In May 1976, after consulting committees of both the House and Senate as well as some 60 federal, state and local agencies, and organizations familiar with the problem of the disabled,[28/] HEW proposed comprehensive regulations implementing section 504.[29/] The May 1976

27/ Not until 1978 did the Act include a program to provide funds for the express purpose of providing jobs to the disabled. See 92 Stat. 2989 (1978).

28/ 1976 Senate Hearings 1491, 1503-04.

29/ In Southeastern Community College v.

announcement, in addition to seeking public comment on the proposed draft, solicited comments on 15 specific issues about which HEW was particularly uncertain. 41 Fed. Reg. 20296-97. But HEW indicated no doubt as to the scope of section 504's application to employment discrimination. The Department emphasized that "section 504 ... differs from ... title VI in the extent to which it applies to employment practices." Id. at 20296. Section 84.11(9)(1) of the draft regulations

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29/ continued

Davis, 442 U.S. 397, 404 n.4 (1979), this Court suggested that HEW chose to rely on the language of section 504 alone until ordered to issue regulations by Cherry v. Mathews, 419 F. Supp. 922 (1976). In fact, however, the 1976 regulations were first issued two months before the July, 1976, decision in Cherry. That decision noted the issuance of those proposed regulations, and retained jurisdiction over the litigation to ensure that no "unreasonable delays" occurred in the promulgation of final regulations. 419 F. Supp. at 924.

Section 84.11(9)(1) of the draft regulations provided:

> No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment, or in the recruitment, consideration or selection therefor, under any programs or activity to which this part applies.30/

HEW expressly noted that the section 504 regulation concerning employment "generally follows the employment provisions of the Department's regulation implementing Title IX of the Education Amendments of 1972..." Id. at 20300; the Title IX regulations covered all employment discrimination in federal education programs, most of which virtually by definition were not primarily concerned with providing employment. See 45 C.F.R. § 86.51(a)(1).

30/ 41 Fed. Reg. 20307 (emphasis added). The regulation was applicable to all recipients of federal funds from HEW. Section 84.2, 41 Fed. Reg. 20305.

In July, 1976, HEW formally proposed a somewhat modified set of section 504 regulations. The accompanying announcement reiterated in identical language the distinction noted in May between the scope of section 504 and Title VI regarding employment practices, as well as the reliance on Title IX regulations, and section 84.11(a)(1) remained unchanged. 41 Fed. Reg. 29548, 29552, 29563. Although the July announcement contained an extensive discussion of public comments on the May draft, there was no indication that any commentator had raised any question regarding the applicability of the employment provisions to all federally assisted programs. Id. at 29552-54. The final regulations ultimately promulgated by HEW in May of 1977 were, like the draft released a year earlier, applicable to employment discrimination in all federally assisted

programs. 45 C.F.R. § 84.11(a)(1).

The correctness of HEW's construction of the law was not questioned until the decision of the Fourth Circuit in Trageser v. Libbie Rehabilitation Center, 590 F.2d 87 (4th Cir. 1978), cert. denied 442 U.S. 947 (1979), held that the Comprehensive Rehabilitation Services Amendments of 1978 restricted section 504 to employment discrimination in federal activities whose primary purpose was to provide employment. Trageser was decided only 42 days after the adoption of the 1978 amendments, and the court conceded it did not know how HEW would construe the new legislation. 590 F.2d at 89 n.11. The courts of appeals following Trageser have either ignored[31/]

31/ Scanlon v. Atascadero State Hospital, 677 F.2d 1271, 272 (9th Cir. 1982); United States v. Cabrini Medical Center, 639 F.2d 908, 910-11 (2d Cir. 1981); Simpson v. Reynolds Metals Co. Inc., 629 F.2d 1226, 1236-37 (7th Cir. 1980).

or refused to consider[32/] HEW's construction of section 504. The appellate opinions rejecting the Trageser limitation, on the other hand, have expressly relied on the broad administrative interpretation of section 504.[33/]

The administrative agencies responsible for applying section 504 have consistently disapproved Trageser's construction of the 1978 amendments. In March, 1979, HEW considered and rejected suggestions that it alter its standards in light of Trageser, insisting that its guidelines

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32/ Carmi v. Metropolitan St. Louis Sewer District, 620 F.2d 672, 675 n.7 (8th Cir. 1980).

33 / LeStrange v. Consolidated Rail Corporation, 687 F.2d 767, 776 (3d Cir. 1982), A-52-53; Jones v. Metropolitan Atlanta Rapid Transit Authority, 681 F.2d 1376, 1382 (11th Cir. 1982); Scanlon v. Atascadero State Hospital, 677 F.2d 1271, 1273 nn.3-4 (9th Cir. 1982)(Perguson, J., dissenting); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672, 677 n.3, 678 n.6 (8th Cir. 1980)(McMillan, J., concurring).

"reflect the Department's current interpretation of its authority". 44 Fed. Reg. 17162, 17174. In 1980 the Department of Justice published a detailed analysis reaffirming the government's view that "the employment practices of recipients of federal financial assistance are covered by section 504 regardless of the purpose of the assistance" and expressly declining to follow Trageser. 45 Fed. Reg. 37628. The United States has aggressively advanced this construction of section 504 in the courts, both in litigation to which it was a party[34/] and through amicus curiae briefs in several cases.[35/]

In sum, the construction of section

34/ United States v. Cabrini Medical Center, supra.

35/ Scanlon v. Atascadero State Hospital, supra; Trageser v. Libbie Rehabilitation Center, supra; Sabol v. Board of Education of Township of Willingboro, 510 F. Supp. 892 (D.N.J. 1981).

504 contained in section 27.31 of the DOT regulation embodies a widespread, long-standing and consistent administrative interpretation of the law, an interpretation first announced only months after the adoption of the 1973 act, emphasized by HEW shortly after that agency was given primary authority for implementing section 504, strongly reiterated following the 1978 amendments, and now followed by a total of 26 federal agencies. This reading of section 504, concurred in by the Departments of Transportation, Justice, and Health, Education and Welfare, is entitled to the "great deference to the interpretation given [a] statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 (1965).

(2) The Rehabilitation Act of 1973

Although both Trageser and petitioner focus their arguments on the 1978 amend-

ments to the Rehabilitation Act, an analysis of the meaning of section 504 must begin with the original enactment of that provision in 1973.

No court prior to the adoption of the 1978 amendments questioned the applicability of section 504 to employment discrimination in all federally assisted programs.[36/] This judicial acceptance of HEW's construction of the law is understandable in light of the actual wording of section 504:

> No otherwise qualified handicapped individual in the United States, as

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36/ See Whitaker v. Board of Higher Education, 461 F. Supp. 99 (E.D.N.Y. 1978); Davis v. Bucher, 451 F. Supp. 791 (E.D Pa. 1978); Duran v. City of Tampa, 451 F. Supp. 954 (M.D. Fla. 1978), 430 F. Supp. 75 (M.D. Fla. 1977); Drennon v. Philadelphia General Hospital, 428 F. Supp. 809 (E.D. Pa. 1977); Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976) aff'd on other grounds, 556 F.2d 184 (3d Cir. 1977); cf. Cook, Nondiscrimination in Employment Under the Rehabilitation Act of 1973, 27 Am. U. L. Rev. 31, 43 n.71 (1977).

> defined in section 7(b), shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal assistance.

Nothing in the broad language of this statute affords any basis for limiting its application to only some employees, certain programs, or particular types of discrimination. "No individual', not "very few individuals", may be discriminated against. "Any program", not "most programs or activities", is forbidden to discriminate.[37/] The prohibition is not limited to denials of benefits or exclusion from participation, but extends broadly to any "discrimination under" federally assisted programs. Here, as in North Haven Board of Education v.

37/ United States v. Cabrini Medical Center, 639 F.2d 908, 910 (2d Cir. 1981), one of the lower court cases relied on by petitioner, concedes that this reference to "any program" "at first blush seems broad enough" to cover all employment claims.

Bell, 456 U.S. 512, 521 (1982), a handicapped "employee who works in a federally funded program is 'subject to discrimination under' that program if ... paid a lower salary for like work, given less opportunity for promotion, or forced to lower salary for like work, given less opportunity for promotion, or forced to work under more adverse conditions than are" his or her non-handicapped colleagues.

The fact that section 504 does not expressly mention employment is clearly of no significance, for the statute does not refer to any specific types of discrimination, but is deliberately cast in all-inclusive general terms. Congress's alleged "failure" to single out employment for particular emphasis no more militates against respondent's claims than Congress's "failure" to mention specifically railroads, or grantees receiving over $1

billion, or discrimination against employees who had lost their left, rather than right hands.[38/]

Had Congress intended to exclude from the scope of section 504 employment discrimination not involving federal employment programs, it certainly knew how to do so. In May of 1972, only four months before section 504 was drafted by the Senate Subcommittee on the Handicapped,[39/] a House-Senate conference committee considered and deleted from Title IX of the Education Amendments an express limitation identical to that which Conrail now seeks to read into section 504. North Haven Board of

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38/ See Guertin v. Hackerman, 496 F. Supp. 593, 595-96 (S.D. Tex. 1980)(rejecting defendants' contention that section 504 applies only to public agencies receiving federal assistance.)

39/ See 118 Cong. Rec. 30680 (remarks of Senator Randolph).

Education v. Bell, 456 U.S. at 528. In addition, section 904 of those Amendments forbad discrimination against the blind by recipients of federal aid to education, but was specifically limited to discriminatory exclusion from "any course of study" and thus literally inapplicable to employment discrimination. 20 U.S.C. § 1684. No such express limitations were placed in section 504.

A broad literal reading of section 504 is strongly supported by section 7(6) of the 1973 act, whose definition of "handicapped individual" delineated the persons protected by section 504. Section 7(6) then provided:

> The term "handicapped individual" means any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabili-

> tation services provided pursuant to Title I and III of this Act.

87 Stat. 361 (1973). Only individuals whose handicap might have inhibited but did not preclude them from working were protected from discrimination by section 504. This definition would have made no sense if section 504 had been generally inapplicable to employment discrimination.

This construction of section 504 is also consistent with the overall goals and other provisions of the Rehabilitation Act. The primary focus of that Act is on enabling the disabled to obtain work. Section 2(8), in a clear reference to section 504, states that a purpose of the Act is to

> promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.

87 Stat. 357 (1973). None of the stated purposes of the statute refer to promoting

and expanding opportunities for the disabled in any other specific area. Title I authorized $1.3 billion in grants to assist handicapped individuals to "prepare for and engage in gainful employment to the extent of their capabilities". 87 Stat. 363. Having provided more than a billion dollars to assist the disabled to return to the work force, it would have been "odd indeed" if Congress had condoned in section 504 the very type of employment discrimination in federally assisted programs which would have frustrated that vital and costly program. Scanlon v. Atascadero State Hospital, 677 F.2d 1271, 1274 (9th Cir. 1982)(Ferguson, J., dissenting). To hold section 504 largely inapplicable to employment discrimination would be like holding Title IX inapplicable to the exclusion to female students from federally funded programs of study.

The legislative history of the 1973 Act fully supports HEW's construction of section 504. Section 504 was drafted by the Senate Subcommittee on the Handicapped after extensive hearings in May and June 1972. Virtually the only form of discrimination against disabled persons which was disclosed at the Senate hearings was discrimination in employment. One study, based on the experience of the President's Committee on Employment of the Handicapped, concluded:

> [T]he disabled face all the obstacles to the able bodied and a myriad of special ones caused by their handicap .... The stigma associated with disability ... hurts the job seeking individual. An employer who does not feel comfortable around a disabled person will not be inclined to hire the handicapped. [C]ertain disabilities, among them epilepsy, and mental illness, carry more stigma than others, but employers react negatively in many cases to any type of disability .... Initially sympathetic employers may also be scared away by the fear that their insurance rates

> will rise if they hire the handicapped ... [although] the safety record of the disabled worker on the job is 8% better than that of the average worker.... Another barrier to employment of the handicapped is the stereotype that exists about their job capabilities. Too often they are seen as workers who can only perform menial tasks. They are regarded as suitable sign painters ... but not as competent white-collar workers.40/

Employment discrimination was a frequent focus of Senate discussion during the year when section 504 was drafted.41/ In

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40/ Hearings on the Rehabilitation Act of 1972 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 92nd Cong., 2d Sess., 534-536 (1972 (hereinafter cited as "1972 Senate Hearings"); see also id. at 1361-62 (employment discrimination against the deaf).

41/ 118 Cong. Rec. 525 (remarks of Sen. Humphrey) ("Millions of young persons and adults who want to learn a trade, work like other people, and establish their selfworth through a paycheck, are barred ... from countless jobs they could do well."), 3321 (remarks of Sen. Williams) ("Too many of our handicapped population are misdiagnosed, mislabled, and hustled out ... of jobs ...."), 9495 (remarks of Senator Humphrey) (victims of discrimina-

February of that year Senator Williams, who later cosponsored the bill containing section 504 and who chaired the Committee on Labor and Public Welfare which reported it to the Senate, placed in the Congressional Record a series of letters describing in graphic detail the employment discrimination suffered by disabled workers. 42/

41/ continued

tion against the handicapped include individuals "who can and want to learn a trade and experience the dignity of work and a paycheck."), 19435 (remarks of Sen. Williams)(placing in record student essay on the employment problems of the disabled); 33319 (remarks of Sen. Dole)("Too many employers are still reluctant to hire the handicapped and look first to disabilities rather than the skills and talents the handicapped possess."); 36761 (remarks of Sen. Mondale) (placing in the record article entitled "Handicapped Tell of Discrimination in Finding Jobs and Getting Insurance")(1972).

42/ 118 Cong. Rec. 3324 (letter of Robert L. Bennett) ("Quite possibly the greatest handicap a handicapped person has is being disqualified for work solely because he is somewhat different.... I am an

Williams noted that the unemployment rate was 52% among paraplegics, 66% among the blind, and 75% among epileptics.[43] The

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42/ continued

epileptic who was refused employment by the Post Office"), 3325 (letter of Charles Bright)("In 1921 I had polio which paralyzed me from the waist down.... Today, with the use of a brace on my right leg and a cane, I do quite well.... I found myself with an almost insurmountable problem -- that of finding a job.... I have had more doors closed in my face, because I was ... handicapped than I care to remember"), 3327 (letter of Mrs. JoAnn Marshall) ("Generally ... handicapped people are the last hired and the first fired.... My husband, a paraplegic has ... been told 'you can't do it' for so long that if it weren't for his tremendous belief in himself and his ability he would have been beaten long ago"), (letter of David Zeise)("I had a 3.5 average, a good record, and excellent recommendations from my teachers. Nevertheless, I've been having a difficult time finding employment because of my poor vision"); (letter of Max Feintuch)("How does a man gain recognition when he isn't given a chance to show what he can do?... [My son's] physical condition always stands in the way of an appointment despite his superior skill and qualifications").

43/ 118 Cong. Rec. 3321.

Senate report accompanying the Rehabilitation Act explained, in a passage reiterated during the Senate debate,[44/] that the hearings had revealed "a lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., employment discrimination...." S. Rep. No. 93-318, 93rd Cong., 1st Sess., p. 4 (1973). During the 1973 debates both Senator Cranston,[45/] the floor manager of the bill, and Senator Stafford,[46/] a cosponsor and the ranking minority member of the subcommittee which drafted it, referred to evidence of "unfounded discrimination in employment" which had been presented at the subcommittee hearings.

44/ 119 Cong. Rec. 24566 (1973) (remarks of Sen. Cranston).

45/ 119 Cong. Rec. 5882.

46/ 119 Cong. Rec. 5893.

Senator Randolph, introducing the committee bill, noted that its overall goal was to "provide a bright, new beginning on the road to meeting the goal of self-sufficiency ... for millions of handicapped Americans."[47/] Senator Taft explained:

> The basic purpose of vocational rehabilitation continues to be to help physically and mentally handicapped individuals achieve the ability to work, earn, and live independently in their community. ....Too many handicapped Americans ... lack jobs and too many are underemployed -- utilized in capacities well below the levels of their training, education and ability. 119 Cong. Rec. 24587.

Senator Cranston noted that the federal vocational rehabilitation efforts were being frustrated by employment discrimination against disabled workers:

47/ 118 Cong. Rec. 30680; see also id. at 30681 (remarks of Sen. Cranston)("The program which is authorized by the legislation will provide ... a true opportunity for [handicapped] individuals to enter or re-enter society on a competitive basis....")

> Despite efforts on the part of ... personnel of the vocational rehabilitation programs, discrimination in placement, hiring and advancement continue to limit the vocational rehabilitation program's ability to effect successful rehabilitations.... The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to ... provide substantial accomplishments in employment for handicapped individuals. 119 Cong. Rec. 5882.

Senators Javits[48/] and Taft[49/] expressed similar concerns.

48/ 119 Cong. Rec. 5898 ("During hearings on H.R. 8395, it became patently obvious that revision of the existing Federal-State programs for rehabilitation of handicapped indiviudals would not solve all of the problem of handicapped individuals particularly in terms of employment. Several additional provisions within H.R. 8395 ... dealt directly with these problems.... [T]he bill ... prohibits discrimination against handicapped individuals in any program or activity receiving federal assistance.")

49/ 119 Cong. Rec. 24587 ("[I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all -- discrimination.")

In light of the importance of eliminating employment discrimination against the disabled, it is hardly surprising that several sponsors of the 1973 Act explained that that was the precise purpose of section 504. Senator Williams noted that the act contained "prohibitions against discrimination in employment in programs assisted with federal funds...." 119 Cong. Rec. 24588. Senator Javits explained that among the portions of the bill addressing "special federal responsibilities" were "provisions for encouraging hiring of the handicapped under federal contracts and under federal grants." 118 Cong. Rec. 32305. Senator Cranston repeatedly asserted that the Act "deal[t] comprehensively with problems such as discrimination in ... federal grants ... problems which ... have a profound effect on the provision of relevant and effective [rehabilitation]

services."[50/]

Between September, 1972, when it was first drafed, and September, 1973, when it was signed into law, section 504 was referred to eight times in three committee mittee reports[51/] and in fifteen instances during House and Senate debates.[52/] On not a single occasion is there the slightest indication that any member of Congress

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50/ 119 Cong. Rec. 5862 (emphasis added); see also id. at 24569.

51/ S. Rep. Nov. 1135, 92d Cong. 2d Sess., 3, 9, 49, 77 (1972): S. Rep. No. 93-318, 93rd Cong., 1st Sess., 18, 50, 70 (1973) H. Conf. Rep. 92-1581, 92nd Cong., 2d Sess., reprinted in 118 Cong. Rec. 35163.

52/ 118 Cong. Rec. 30681, 30682 (two references), 30683 (remarks of Sen. Williams), 32280 (remarks of Sen. Cranston), 32281 (remarks of Sen. Cranston), 32305 (remarks of Sen. Javits), 32310 (remarks of Sen. Humphrey), 32613 (remarks of Sen. Cranston); 119 Cong. Rec. 5862 (remarks of Sen. Cranston), 5898 (remarks of Sen. Williams), 24569 (remarks of Sen. Cranston), 24587 (remarks of Sen. Randolph), 24588 (remarks of Sen. Williams), 24589 (remarks of Sen. Dole).

understood or intended section 504 to have a scope narrower than its broad literal meaning. On not a single occasion is there any reference to section 604 of Title VI or to federal programs whose "primary objective ... is to provide employment." The draftsmen of section 504 could hardly have been more emphatic in explaining their preoccupation with employment discrimination, and a member of Congress who read section 504, reviewed the relevant reports, and listened to the debates, could only have concluded that it was to employment discrimination above all that section 504 was to apply.

(3) The Rehabilitation Act Amendments of 1974

In 1974 Congress amended section 7(6) of the Act to remove employability as a prerequisite to protection under section 504. The legislative history of that amend-

ment 53/ makes clear the understanding of Congress that section 504 applied generally to employment discrimination. The Senate report explained

> It was clearly the intent of the Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individuals" in those sections was not to be narrowly limited to employment ... 54/

Senator Stafford reiterated the argument made in 1973 regarding the relationship between rehabilitation programs and nondiscrimination in employment. 120 Cong. Rec. 30532 (1974).

53/ 88 Stat. 1619. The amendment added to section 7(6) the following language:

> "For the purposes of titles IV and V of this Act such term means any persons who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment."

54/ S.Rep. No. 93-1297, 93rd Cong. 2d Sess., 37-38 (1974) (emphasis added).

The recently promulgated HEW regulations, which forbad employment discrimination without regard to the "primary objective" of the federal assistance, were also the subject of comment. See p. 48, supra. The Senate report noted that HEW, in drafting its regulations, had worked closely with the relevant House and Senate Committees in a "generally useful and satisfactory" manner "to ensure that implemenation of the provisions of the Act would be accomplished in accordance wtih the intent of Congress." The resulting regulations were "in most respects reflective of underlying congressional intent," except where, as in the case of section 7(b), "clarifying and perfecting changes in the Act" were needed.[55/] Senator Cranston expressed identical views on the floor of the Senate. 120 Cong. Rec. 30530. This approval of HEW's regulations was expressed

within a year of the adoption of section 504 by the same committee which had drafted and the same Congress which had enacted that provision.

Petitioner asserts that the Senate report "noted that Section 504 was to be interpreted ... in pari materia with Title VI." (Br. 17.) But the passage relied on by petitioner refers, not to Title VI as a whole, but only to section 601 of the 1964 Civil Rights Act, and mentions Title IX as well:

> Section 504 of was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 20 U.S.C. 1681 (relating to sex). S. Rep. No. 93-1297, 39.

To the extent that any conclusion can be

55/ S.Rep. No. 93-1297, 93rd Cong. 2d Sess., 25 (1974).

drawn from this statement, it supports a broad literal reading of section 504. Section 901 has already been held by this Court to be fully applicable to employment discrimination, North Haven Board of Education v. Bell, 456 U.S. 512 (1982), while the scope of section 601 is at best unclear. 456 U.S. at 530 n.20. More importantly, North Haven expressly disapproves construing one statute by resort to the legislative history of some other provision after which it may have been patterned. "It is Congress' intention in" 1973, "not in 1964, that is of significance in interpreting" section 504. 456 U.S at 529.[56/]

56/ In 1975 the Senate adopted, as part of the Education for All Handicapped Children Act, Pub.L. 94-142, a provision requiring the recipients of assistance under that statute to take affirmative action to employ and promote qualified handicapped individuals. A House-Senate conference committee deleted this provision with the following explanation:

(4) Rehabilitation Amendments Of 1978

Petitioner's central contention, and the theme of Trageser and its progeny, is that Congress, by enacting in 1978 section 505(a)(2) of the Rehabilitation Act, intended to limit the application of section

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56/ continued

> "The conferees deleted the language in the Senate bill making financial assistance conditional upon ... asssurances [of affirmative action] because section 504 of the Rehabilitation Act of 1973 already establishes, as a matter of federal law, that no qualified handicapped individual in the United States shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance. It is clear that qualified handicapped individuals who, because of their handicap, are refused employment by recipients of assistance under the Act are fully covered by the prohibition in section 504 of the Rehabilitation Act of 1973."

S. Conf. Rep. No. 94-455, 94th Cong., 1st Sess., 54 (1975). (emphasis added)

504 to employment discrimination in federal programs whose primary objective is to provide employment, and thus to invalidate section 86.51(a)(1) of the HEW regulations. The Congress which enacted section 505(a)(2) was familiar to an unusual degree with HEW's construction of section 504 and had been instrumental in prompting HEW to formulate and issue in 1976 and 1977 the regulations embodying those views.[57/] In January, 1977, HEW Secretary Mathews forwarded HEW's proposed regulations to Congress with a letter expressing the Department's desire "to lay its interpretation before the Congress so that it can provide whatever

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57/ S. Rep. No. 93-1297, 39-40 (1974); 1976 Senate Hearings 323 (testimony of Rep. Dodd), 1502 (statement of Sen. Williams), 1511 (statement of Sen. Williams). Hearings on S.2600 before the Subcommittee on the Handicapped of the Senate Committee on Human Resources, 95th Cong., 2d Sess., 5, 1130-31, 1244, 1247, 1269-70, 1281 (1978)(hereinafter cited as "1978 Senate Hearings").

clarification is appropriate".[58] In April of 1977 Joseph Califano, the new Secretary of HEW, wrote individually to every member of House and Senate, enclosing a copy of the final regulations, and urging that "Congress evaluate the regulation, and the implementation process, to ensure that they conform to the will of Congress."[59] Following the promulgation of the HEW regulations, a House subcommittee conducted further hearings on the implementation of section 504 at which the Director of HEW's Office of Civil Rights provided a detailed description of the employment discrimination provisions.[60]

By 1978 Congress was thus fully aware of the content of the HEW regulations. The

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58/ 1977 House Hearings 73.

59/ Id. at 76.

60/ 1977 House Hearings 294-95.

central issue presented by the 1978 amendments is whether Congress intended to drastically narrow the scope of section 504 and to overturn one of the critical provisions of the HEW regulations whose issuance had been sought by Congress only a year before.

Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under Section [504] of this title.

Petitioner contends that this language incorporates into section 504 the substance of section 604 of Title VI, which precludes any agency enforcement action regarding employment discrimination "except where a primary objective of the Federal financial assistance is to provide employment". Petitioner further contends that by thus

incorporating section 604 Congress intended to preclude private as well as agency action to prevent or redress employment discrimination other than in a federal employment programs.

Petitioner's proposed construction flies in the face of the literal language of section 505(a)(2). First, section 505(a)(2) does not refer to all of Title VI, but only to the "remedies, procedures and rights" contained in that Title. Section 604 is neither a "remedy", a "right" nor a "procedure"; it does not provide persons aggrieved by a violation of Title VI with any substantive entitlements, with any form of redress, or with any method for obtaining that relief.[61/]

61/ Black's Law Dictionary defines a "remedy" as the means employed to enforce a right or redress an injury. (Rev. 5th ed. 1979) p. 1103. The term "right" generally connotes "a power, privilege faculty, or demand, inherent in one person and incident

Petitioner itself never describes section 604 as a right, remedy, or procedure, but consistently and accurately refers to it instead as a "limitation"[62/] or "restriction"[63/]. Had Congress intended to incorporate into sections 504 and 505 all of Title VI, the "restrictions" as well as the "rights," it could and would have said so. Second, the Title VI machinery referred to by section 505(a)(2) is not made the exclusive method of redress open to an aggrieved individual. Section 505(a)(2) is merely permissive, it provides that the Title VI rights, remedies and procedures

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upon another" Id. at 1189. "Procedures" prescribe methods of "enforcing rights or obtaining redress for their invasion". Id. at 1083. The provisions of section 604 obviously fit none of thse definitions.

62/ Brief for Petitioner, pp. 2,6,8; Petition for Writ of Certiorari, pp. 8, 10, 12.

63/ Brief for Petitioner, pp. 13, 19; Petition for Writ of Certiorari, pp 10, 14 n. 7.

"shall be available", but does not forbid resort to other rights, remedies or procedures. Far from "evincing an intent to require identical enforcement" of Title VI and section 504 (Br. 19), the words "shall be available" demonstrate an intent merely to add Title VI enforcement methods to whatever other devices might already be available to enforce section 504. Third, the restriction contained in section 604, as petitioner itself concedes (Br. 9), is literally applicable only to action by "any department or agency", not to litigation brought by a private individual. Thus even if section 505 had expressly made section 604 applicable to the enforcement of section 504, such a provision still would not affect the ability of the federal courts to afford relief in a civil action such as this. Petitioner suggests that a literal reading of section 604 would give

private individuals greater enforcement authority than is enjoyed by Federal agencies. (Br. 10). But section 505 does not limit agency enforcement either, not merely because section 604 is not a right, remedy and procedure and because section 505 makes Title VI enforcement methods "available" but not mandatory, but also because section 505(a)(2), which incorporates the relevant Title VI provisions, itself applies only to actions by aggrieved "persons". Thus, the limitation contained in section 604 is inapplicable to private parties because of the literal language of section 604, and inapplicable to federal agencies because of the literal language of section 505(a)(2).

If section 505(a)(2) had the meaning urged by petitioner, it would have legalized employment discrimination against the handicapped in literally millions of jobs

where it had been forbidden from 1973 through 1978. Such an implied partial repeal of section 504 is not to be inferred in the absence of unequivocal statutory language. Morton v. Mancari, 417 U.S. 535, 549-51 (1974). Other aspects of the 1978 amendments militate strongly against such a construction of section 505(a)(2). Section 505 itself is entitled "Remedies and Attorneys' Fees," 92 Stat. 2982, a title which clearly indicates the author's belief that they were assisting the implementation, not narrowing the substantive scope, of section 504. The provision for counsel fees contained in Section 505(b) signals a general congressional intent to facilitate rather than impede private enforcement of section 504. The programs authorized by the 1978 amendments confirmed the priority Congress continued to attach to the employment of handicapped individ-

uals. Section 101, for example, authorized over $3.7 billion over four years for vocational rehabiliation programs, programs which would be directly frustrated by employment discrimination against the disabled. It is inconceivable that Congress would in the same statute have committed billions of dollars in aid to rehabilitate and provide jobs for disabled individuals, and yet simultaneously have legalized discrimination against that very disadvantaged group by the recipients of other federal grants.

The report of the Senate Committee which drafted section 505(a)(2) explained that, far from restricting the scope of 504, that new provision was "designed to enhance the ability of handicapped individuals to assure compliance with the Civil Rights Provisions of Title V ..."[64/] The

64/ S. Rep. No. 95-890, 95th Cong, 2d Sees., 18 (1978).

report made clear that the phrase "procedures, remedies and rights set forth on Title VI" referred to the administrative rules which had been issued by HEW for implementing Title VI:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education and Welfare with respect to procedures, remedies, and rights under Section 504 conform with those promulgated under Title VI. Thus, this amendment codifies existing practice as a specific statutory requirement. 65/

That understanding was entirely correct. HEW's section 504 regulations expressly incorporated the procedural provisions of the Title VI regulations; section 84.61 provided:

> The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in § 80.6-80.10 and Part 81 of

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65/ Id. 19 (emphasis added).

this Title. 66/

The cited Title VI regulations, which the commentary accompanying section 504 described as "complaint and enforcement procedures", concerned compliance reports, the conduct of investigations, methods for bringing about compliance, and the conduct of administrative hearings. See 42 Fed. Reg. 22694-701 (1977). The procedural regulations incorporated by reference into the section 504 regulations, and reprinted with them in the Federal Register, did not, however, include section 80.3 of the Title VI regulations, which limited the application of Title VI to employment discrimination in federal employment programs. 45 C.F.R. § 80.3 (c).

66/ 42 Fed. Reg. 22685 (1977). HEW had earlier declared its intent to incorporate by reference into section 504 the Title VI procedural regulations. 41 Fed. Reg. 29548 (1976).

Thus when the Senate report asserted that the "procedures, rights and remedies" under the section 504 regulations "conform with those...under Title VI", it was referring to the incorporation by reference into section 84.61 of the procedural provisions of the Title VI regulations. The Senate committee did not, as petitioner suggests, "overlook the differences between the HEW regulations... under Title IV and Section 504... with respect to employment practices." (Br. 21.) Rather, it was the identical Title VI and Section 504 procedural regulations, not their differing substantive provisions, to which the words "procedures, rights and remedies" in both the Senate report and section 505(a)(2) refer.

Petitioner's suggestion that Congress intended section 505(a)(2) to radically reduce the protection afforded handicapped

workers is inconsistent with the continued concern about employment discrimination articulated during the Senate debates.[67/] In opposing an amendment that would have limited the extent to which alcoholics and drug abusers were protected by Section 504, Senators Williams and Hathaway quoted a 1977 opinion of the Attorney General that: "section 504 does in general prohibit discrimination against alcoholics and drug addicts in federally assisted programs solely because of their status as such."[68/]

67/ 124 Cong. Rec. 30304 (remarks of Sen. Randolph) ("One of the areas where handicapped Americans have been subjected to unconscionable discrimination...has been in the area of employment"), 30325 (remarks of Sen. Hathaway) ("There is ample evidence that addicts and alcoholics are subject to discrimination in access to...employment")

68/ 124 Cong. Rec. 30323 (remarks of Sen. Williams), 30324-5 (remarks of Sen. Hathaway). Williams also quoted an opinion by the Secretary of HEW that "an alcoholic or drug addict may not be...disqualified from employment solely because of his condition ..." Id. at 30323.

In arguing against a proposal that would have narrowed the circumstances under which courts could grant injunctive relief to redress employment discrimination by the federal government, Senator Cranston asserted:

> I believe that the requirement with respect to Federal contractors and grantees should be no less stringent that the requirements attached to the Federal Government. The amendment would create an unwise and unrealistic distinction with respect of employment between the obligations of the Federal Government and the obligations of Federal contractors and grantees... [T]he... amendment would limit... the Federal Government's obligation of being an equal opportunity employer. Federal contractors and grantees would appropriately continue to be required to be equal opportunity employers. Rather than a leader in this field, the Federal Government would become a distant also-ran requiring more of its grantees and contractors than it would be willing to require of itself.

124 Cong. Rec. 30577-7. This argument would simply have made no sense if, as petitioner suggests, section 504 did not apply to the employment practices of most

federal grantees.

The sponsors and proponents of the Senate bill repeatedly assured their colleagues that the purpose and effect of the legislation were to expand the opportunities for the disabled. Senator Randolph, the floor manager, opened the debate by asserting that "[a]ll of the provisions of this bill... not only provide opportunities to handicapped Americans to aspire to certain goals but also provide the means by which they can reach those goals." 124 Cong. Rec. 30303. Senator Javits announced that the bill would "properly expand structures currently in place to protect the rights of [disabled citizens]." And Senator Cranston, the author of section 505(a)(2),[69/] explained in a direct reference to that section that "[p]rovisions in the ... bill such as...certain

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69/ 124 Con. Rec. 30346-47.

application of appropriate Civil Rights remedies...should be important steps in our continuing efforts toward full participation in society by handicapped Americans."[70/]

The discussion of the HEW regulations by the Congress which enacted the 1978 Amendments are entirely inconsistent with any intent to overturn section 84.11. In the spring of 1977, when the proposed section 504 regulations containing section

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70/ 124 Cong. Rec. 37509; see also id. at 30303 (remarks of Sen. Randolph) (bill "affirms not only the rights of these severely and profoundly handicapped individuals but also strengthens the rights and protections of all citizens"), 30337 (remarks of Sen. Dole)(bill "provides a host of opportunities for the handicapped"), 30349 (remarks of Sen. Cranston)(bill "promises a major step forward in our continuing efforts to assist handicapped individuals") 37506 (remarks of Sen. Stafford)(bill "will significantly enhance the opportunities for handicapped individuals") 37508 (remarks of Sen. Hathaway) (bill will "renew our national commitment to help these individuals help themselves").

84.11 were awaiting final action, members of both the House and Senate repeatedly took the floor to urge HEW to approve them as written. Representative Koch deplored Secretary Califano's lack of commitment to signing the regulations "in their current form". 124 Cong. Rec. 10455. Congressman Dodd expressed concern about possible changes in the proposed, insisting "these regulations must not be weakened". Id. at 10823. Senator Cranston called for the "prompt and effective implementation" of the regulations, and wrote to Secretary Califano urging that the draft "be considered presumptively valid" and expressing opposition to any changes that might weaken them. Id. at 12410. Those pressing for issuance of the final regulations repeatedly stressed the need for protection against employment discrimination. Congressman Koch insisted that those handicapped indi-

viduals who favored, as he did, promulgation of the regulations, "are simply demanding the right to participate as equals for opportunities for jobs they are capable of doing."[71/] The final promulgation of those regulations by HEW was greeted with virtually unanimous praise by the Congress, with many speakers again referring to the problem of employment discrimination.[72/] The only concerns expressed

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71/ 123 Cong. Rec. 10455; see also id. at 10292 (remarks of Rep. Koch) ("Delays in implementing section 504 have been cited as contributing to the consistently high rate of unemployment among disabled persons ..."), 10822 (remarks of Rep. Dodd)(the disabled "must not be forced to wait any longer before they are allowed to enjoy the same rights to a job...that the rest of our citizens have."), 12216 (remarks of Sen. Humphrey)(disabled regard section 504 as a "charter for fair employment in jobs for which they qualify").

72/ 123 Cong. Rec. 12760 (remarks of Sen Randolph), 13342 (remarks of Sen. Cranston), 13515 (remarks of Sen. Humphrey), 13635 (remarks of Rep. Brodhead), 14133 (remarks of Rep. Koch), 14552 (remarks of Sen. Haskell).

about the regulations focused on whether the federal government should bear a share of the financial cost of compliance,[73/] and Congress declined either to alter the statute because of such costs or to authorize additional federal funds to help defray them.

If, as petitioner urges, Congress intended section 505(a)(2) to incorporate section 604 of the 1964 Civil Rights Act and to override the well-known HEW regulations regarding employment discrimination, that intent was carried out through a conspiracy of silence. Nowhere in over 3000 pages of hearings, four committee reports, or two years of debate is there a reference to section 604. Not a single

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73/ 123 Cong. Rec. 17546-48 (remarks of Rep. Jeffords), 19051-52 (remarks of Rep. Jeffords), 32618 (remarks of Rep. O'Brien). Neither Jeffords nor O'Brien voiced any objection to the substantance of the regulations.

witness, Representative or Senator ever voiced the slightest objection to the HEW regulations, or suggested that fewer federal grantees would be forbidden to discriminate on the basis of handicap. Nothing in the reports or debates could have alerted the House or Senate to the possibility that the 1978 amendments would reduce the protections and remedies which for five years had been available to disabled workers. If the authors of section 505(a)(2) intended to overturn the HEW regulations and partially repeal section 504, theirs was a plan that was never articulated to solve a problem that had never been mentioned through a change that was never revealed to any of their colleagues. "[I]n light of the great emphasis which the Act places upon securing employment opportunities for handicapped individuals, it is remarkable to attribute to

Congress a desire to gut this protection by such a deft, unheralded maneuver." Hart v. County of Alameda, 485 F. Supp. 66, 72 (N.D. Cal. 1979)[74/]

IV. THE DISCRIMINATION ALLEGED IN THIS CASE CONSTITUTED "DISCRIMINATION UNDER [A] PROGRAM OR ACTIVITY RECEIVING FEDERAL ASSISTANCE" WITHIN THE MEANING OF SECTION 504

Section 504, in language identical to that in Title VI and Title IX, provides that no person may on an impermissible basis "be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any

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74/ Because of its view of section 504, the Court of Appeals did not have occasion to decide whether providing employment was "a primary objective" of any of the programs under which petitioner has received federal assistance. Should this Court hold that section 504 only applies to employment discrimination in programs with that objective, it should remand this case to the Court of Appeals for consideration of whether such programs were involved in this case.

program or activity receiving federal financial assistance ...." Although the terms of these prohibitions are similar, Titles VI and IX contain enforcement restrictions which are not found in section 504. See 20 U.S.C. § 1682, 45 U.S.C. § 2000d-1.

In North Haven Board of Education v. Bell, this Court, while noting the program-specific nature of Title IX, did not attempt to define "program." 456 U.S. at 540. We do not here attempt to offer a comprehensive explication of the "program or activity" language of section 504. The experience of the lower courts in applying section 504, Title VI and Title IX demonstrates that federal funds benefit individuals, and discrimination may injure them, in a wide and complex variety of ways and circumstances. We believe this Court should not attempt to define in a single

opinion the legal status of each of these situations, and urge instead that the explication of the "program or activity" language proceed on a case by case basis.

Petitioner Conrail was established pursuant to the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 701 et seq. In light of the bankruptcy of eight major railroads, and the possibility of termination of the rail service which they provided, Congress directed the reorganization of the railroads into a single system operated by a federally chartered corporation. Regional Rail Reorganization Act Cases, 419 U.S. 102, 108-117 (1974). Because of the financial condition of the railroads to be merged into this system, Congress recognized that a substantial infusion of federal funds would be required. Under section 216 of the act, Conrail has received $3.28 billion which may be used

for the modernization of rail properties, for the acquisition of equipment, for the refinancing of indebtedness, or as working capital. 45 U.S.C. § 726(b)(1). Under Title V of the act, 45 U.S.C. § 797 et seq., Conrail has received $317.8 million in federal aid to assist workers adversely affected by the consolidation of the rail lines. Title V funds can be utilized by Conrail to retrain or move workers, and to pay allowances to unemployed or terminated employees. The total amount received by Conrail under the Rail Act, over three and one half billion dollars, exceeds the sum of all federal aid received by many states and most cities in recent years.

We maintain that Conrail's refusal to employ LeStrange meets section 504's "program or activity" requirement for several distinct reasons. First, we urge that the

term "program" includes all the activities for which the recipient seeks and actually obtains federal funds to engage in, regardless of whether some portion of those activities may in fact be paid for with non-federal funds. Section 27.9(a) of the DOT regulations requires:

> Each application for Federal financial assistance to carry out a program ... shall, as a condition to approval... be accompanied by, written assurance that the program will be conducted ... in compliance with all the requirements imposed by ... this part. 49 C.F.R. § 27.9(a) (emphasis added).

The earlier HEW section 504 and Title VI regulations are similar. 45 C.F.R. §§ 80.4(a)(1), 85.5(a). The scope of protection afforded by this assurance extends to the entire program of activities for which federal funds are to be provided, without regard to whether other funds may also be utilized in that program.

Any or all of the $3.28 billion in section 216 funds obtained by Conrail

could have been used as working capital to meet ordinary business expenses such as wages; $631 million was actually applied for such purposes. A-17. The employment of engineers such as LeStrange was thus clearly among the functions for which federal assistance was sought by and given to Conrail. Petitioner, however, suggests that section 504 requires proof that "the position for which LeStrange applied was funded with federal money...."[75/] But neither the applicable regulations nor the statutory language support such a narrow construction of section 504; that provision is "program-specific" not "job-specific." If petitioner is correct, section 504 would apply only to those employees whom the recipient chose to pay

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75/ Brief for Petitioner, p. 25; see also Id. at 26.

with federal funds. Were that the case, Conrail's accountants, not federal law, would determine who was protected by section 504 and Conrail could evade completely the commands of section 504 merely by using non-federal funds for any job slot from which it intended to exclude a handicapped worker.[76/] Only by reading section 504, as do the DOT and earlier HEW regulations, to cover all activities for which the federal assistance could be used can

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76/ Such a construction of the law "would allow major institutions receiving substantial amounts of federal aid to dissect themselves, at whim, into discrete entities, to allocate federal dollars into programs which cannot discriminate against handicapped persons, and to free privately obtained funds from those programs and instead to channel such money into programs purportedly immune from Section 504 strictures." Wright v. Columbia University, 520 F. Supp. 789, 792 (E.D. Pa. 1981.) See also United States v. City of Chicago, 549 F.2d 415, 442 (7th Cir. 1977); Haffer v. Temple University 524 F.Supp. 531 (E.D. Pa. 1981), aff'd 688 F.2d 14 (3d Cir. 1982).

such evasion be prevented.

Second, even if federal funds had not been available to pay LeStrange, he still would have been protected by section 504 because of Conrail's use of federal funds to purchase equipment and to construct or improve its track system. Where federal funds are employed to acquire or improve real or personal property, the nondiscrimination requirement applies to the utilization of that property so long as it continues to be "used for the purpose for which the Federal financial assistance was provided or for a similar purpose." 49 C.F.R. §§ 27.9(b)(1) and (b)(2). In the instant case Conrail spent over $2.7 billion in federal funds to rehabilitate almost all of its high-density main line track system, to rebuild or convert locomotives or other equipment, and for additions and improvements in rail yards and

other physical plants. A-17. It is inconceivable that none of this vast expenditure at any time affected the jobs on which LeStrange would have worked, and Conrail does not claim that this occurred.

In addition, section 27.7(b)(6) of the DOT regulations provides:

> [T]he aid, benefit, or service provided under a program or activity receiving or benefitting from federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented ... in whole or in part, with federal assistance. (Emphasis added.)

This regulation has its roots in Simkins v. Moses H. Cone Memorial Hospital,[77/] which served as a model for Title VI, and which held all the activities of a nominally private hospital were "state action" because part of the hospital building had been

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77/ 323 F.2d 959 (4th Cir. 1963) (en banc), cert. denied 376 U.S. 938 (1964).

constructed with federal funds.[78/] Conrail's system of yards and contiguous track and road bed constitutes a single facility within the meaning of the regulations. See 49 C.F.R. § 27.5. Thus even if the tracks and buildings which LeStrange would personally have used were not built or renovated with federal funds, the use of federal aid for that purpose elsewhere in the system renders section 504 applicable throughout.

Third, the benefit of federal assistance may extend beyond the immediate activity for which the funds are expended if they in fact replace funds which the recipient is thus free to spend on other activities. Often, of course, the federal aid will be used for a program which would not have been operated but for that assistance, or be applied to increase the size

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78/ See 323 F.2d at 971 (Haynsworth, J., dissenting.)

or scope of some pre-existing function. In such cases there would be no non-federal funds released for other purposes. But where a plaintiff can show that one of the benefits of federal assistance was to displace other funds which the recipient was able to use elsewhere, and that the amount of the funds thus released for general purposes was not de minimis, the benefit of the federal assistance includes the equivalent of an unrestricted grant in the amount of the released funds, and extends to any activities for which they could have been spent.[79/] Ordinarily ascertaining whether such funds had thus been released for general use would involve

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79/ See Haffer v. Temple University 524 F.Supp. 531, 537 (E.D. Pa. 1981) aff'd 688 F.2d 14 (3d Cir. 1982); Poole v. South Plainfield Board of Education, 490 F.Supp. 948, 951 (D.N.J. 1980); Bob Jones University v. Johnson, 396 F.Supp. 597, 602-03 (D.S.C. 1974), aff'd sub nom. Bob Jones University v. Rhodebush, 529 F.2d 514 (4th Cir. 1975).

factual issues to be resolved in the first instance by the trial court. In this case, however, such an evidentiary inquiry is not necessary. The $317 million in Title V funds was specifically intended to relieve Conrail of its contractual obligations under collective bargaining agreements in existence in 1973 to provide severance pay or other benefits to employees who lost their jobs. Section 504(a) expressly superseded all job stabilization provisions in those agreements, 87 Stat. 1014, and the severance pay formula contained in section 505(f) was based on the formula that would have applied under the agreements. S. Rep. No. 93-601, 93rd Cong., 1st Sess., 48 (1973). Thus the very purpose of Title V was to help meet Conrail's preexisting financial obligations to its employees, and as a consequence to release for other uses

the funds which would otherwise have been expended to meet those obligations.

CONCLUSION

For the above reasons the decision of the Court of Appeals should be affirmed.

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STATUTORY APPENDIX

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a, provides:

> (a)(1) The remedies, procedures, and rights set forth in section 717

of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k) shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 601 of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, provides:

No person in the United States shall, on the ground of race, color, participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Section 604 of the 1964 Civil Rights Act, 42 U.S.C. § 2000d-3, provides:

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

49 C.F.R. § 27.7(b)(4) provides:

A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration: (i) That have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially reducing the likelihood that handicapped persons can benefit by the objectives of the recipient's program, or (iii) that yield or perpetuate discrimination against another recipient if both recipients are subject to common administrative

control or are agencies of the same State.

49 C.F.R. § 27.9 provides:

(a) General. Each application for Federal financial assistance to carry out a program to which this part applies, and each application to provide a facility, shall, as a condition to ap proval or extension of any Federal financial assistance pursuant to the application, contain, or be accompanied by, written assurance that the program will be conducted or the facility operated in compliance with all the requirements imposed by or pursuant to this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) Future Effect of Assurances. Recipients of Federal financial assistance, and transferees of property obtained by a recipient with the partici pation of Federal financial assistance, are bound by the recipient's assurance under the following circumstances:

(1) When Federal financial assistance is provided in the form of a conveyance of real property or an interest in real property from the Department of Transportation to a recipient, the instrument of conveyance shall include a convenant

running with the land binding the recipient and subsequent transferees to comply with the requirements of this part for so long as the property is used for the purpose for which the Federal financial assistance was provided or for a similar purpose.

(2) When Federal financial assistance is used by a recipient to purchase or improve real property, the assurance provided by the recipient shall obligate the recipient to comply with the requirements of this part and require any subsequent transferee of the property, who is using the property for the purpose for which the Federal financial assistance was provided, to agree in writing to comply with the requirements of this part. The obligations of the recipient and transferees under this part shall continue in effect for as long as the property is used for the purpose for which Federal financial assistance was provided or for a similar purpose.

(3) When Federal financial assistance is provided to the recipient in the form of, or is used by the recipient to obtain, personal property, the assurance provided by the recipient shall obligate the recipient to comply with the requirements

of this part for the period it retains ownership of possession of the property or the property is used by a transferee for purposes directly elated to the operations of the recipient.

(4) When Federal financial assistance is used by a recipient for purposes other than to obtain property, the assurance provided shall obligate the recipient to comply with the requirements of this part for the period during which the Federal financial assistance is extended to the program.

49 C.F.R. § 27.11(c)(2) provides:

A recipient shall, within 180 days from the effective date of this part, after consultation at each step in paragraphs (c)(2) (i)-(iii) of this section with interested persons, including handicapped persons and organizations representing the handicapped:

(i) Evaluate its current policies and practices for implementing these regulations, and notify the head of the operating administration of the completion of this evaluation;

(ii) Identify shortcomings in compliance and describe the methods used to remedy them;

(iii) Begin to modify, with official approval of recipient's management, any policies or practices that do not meet the requirements of this part according to a schedule or sequence that includes milestones or measures of achieve ment. These modifications shall be completed within one year from the effective date of this part;

(iv) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted from previous policies and practices; and

(v) Establish a system for periodically reviewing and updating the evaluation.

49 C.F.R. § 27.31(a)(1) provides:

No qualified handicapped applicant for employment, or an employee shall, on the basis of handicap be subjected to discrimination in employment under any program or activity that receives or benefits from Federal financial assistance.

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No. 82-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

Respondent's arguments in support of her construction of the Rehabilitation Act of 1973, as amended, rely on a fundamental misconception: In the absence of federal intervention into the work place on behalf of handicapped persons, employers such as Conrail "would be free to refuse to hire an attorney because he or she had a bad back, to pay a ticket clerk less because he or she used a cane, or to fire a baggage handler because he or she used a hearing aid." Respondent's Brief (hereinafter R. ——) at 40-41. *See also*, R. 84. Respondent's asser-

tion ignores the existence of state laws in the vast majority of the states prohibiting employment discrimination on the basis of handicap (see Appendix A to this Brief). Statutes prohibiting such discrimination are in force in Pennsylvania, Conrail's principal place of business, and in every other state in which Conrail does business except Delaware. The issue in this litigation is not whether handicapped individuals will be left wthout a remedy; rather, it is whether Congress intended to use the receipt of federal assistance as the basis for intervening in work place employment decisions irrespective of the underlying purpose of the federal program or assistance.

Contrary to the arguments of Respondent and the supporting amici, Congress never envisioned such a far-ranging remedial scheme. The 1973 Act was directed principally at the creation and maintenance of vocational programs for the handicapped, not employment discrimination. During the period between 1973 and 1978, Congress gradually recognized that specific enforcement provisions were needed to support the objectives of Section 504. Congressional efforts to provide for such enforcement culminated in the 1978 Amendments to the Rehabilitation Act, which incorporate into Section 504 all of the remedies, rights and procedures of Title VI of the Civil Rights Act of 1964. Because Section 504 was intended to prevent discrimination in connection with specific programs, the limitation in Section 604 of Title VI with respect to employment practices also applies to Section 504. Such an interpretation would simply limit federal intervention in the work place to those situations where the primary objective of the federal assistance is to provide employment—a result that is compatible with the purposes of the specific programs providing federal assistance.

Petitioner argued in its initial brief that there is no private cause of action under Section 504. With *Guard-*

ians Ass'n v. Civil Service Commission of the City of New York, 103 S.Ct. 3221 (1983), a majority of the Court has since then recognized a private right of action under Title VI. In light of Section 505(a)(2), which incorporates the "remedies, rights and procedures" of Title VI into Section 504, Conrail no longer argues that Section 504 cannot be enforced through a private action. Nonetheless, Conrail maintains that a monetary remedy is unavailable in a private action under Section 504, and consequently, this case is moot.

I. The Plain Language Of The Rehabilitation Act Contains An Express Limitation On Employment Discrimination Actions

Respondent and amici construe the "remedies, rights and procedures" of Title VI incorporated into Section 504 to exclude Section 604 because the latter provision is a "restriction" or "limitation", rather than a "remedy", "right" or "procedure". R. at 81-82; U.S. Brief (hereinafter U.S. ——) at 23.[1] Respondent and amici further assert that Congress intended Section 505(a)(2) to make available only the procedural, rather than the substantive, provisions of the Title VI regulations for Section 504 complaints. (R. 87-89); (U.S. 24-25); (AFSCME 12-13, 15-16).

To argue that "Sec. 604 pertains not to rights, but to limitations on rights, is a distinction without meaning." *Sabol v. Board of Education*, 510 F. Supp. 892, 897-98 (D. N.J. 1981). The "remedies, rights and procedures" in Title VI, do not exist apart from their limitations and cannot be incorporated into the Rehabilitation Act without them. Obviously, Congress could have incorporated Title VI without Section 604, but it did not do so. Congress

[1] The amicus brief of the American Federation of State, County and Municipal Employees, *et al.*, shall be referred to as (AFSCME ——); the amicus brief of Senator Alan Cranston, *et al.*, shall be referred to as (Cranston ——).

could also have incorporated solely the "procedures" of Title VI, but it did not do so. As noted by the Court, "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet." *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974).

Moreover, both the Department of Health and Human Services ("HHS") and the Department of Justice ("DOJ") have acknowledged that certain substantive limitations contained in Title VI apply to Section 504. In the HHS Section 504 Guidelines, the agency determined that Section 504 would not cover contracts of guaranty and insurance, based on an interpretation provided by the DOJ, 43 Fed. Reg. 2132 (Jan. 13, 1978).[2] Under this interpretation, the DOJ reasoned that, because Congress intended to apply the exclusion of such contracts under Section 602 of Title VI to Section 601, the same analysis should be utilized for the similarly worded Section 604. Both Sections 602 and 604 of Title VI operate to exclude certain recipients of federal funds from the scope of Title VI and both are addressed specifically to agencies. Nonetheless, the HHS and DOJ have considered one of these provisions, Section 602, to be applicable to Section 504.

Respondent also argues that Section 505(a)(2) is not a mandatory provision, but that it merely supplements certain unidentified pre-existing remedies (R. 82-83). In conjunction with this argument, Respondent contends that Section 604 cannot limit individual Section 504 ac-

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[2] The DOJ interpretation is set forth in a letter, dated September 23, 1977, from John M. Harmon, Assistant Attorney General, to F. Peter Libassi, General Counsel for the HEW, which is reprinted in *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. On Select Education of the Comm. on Education and Labor of the House of Representatives*, 95th Cong., 1st Sess. 353, 355-56 (1977) ("1977 House Hearings").

tions, because Section 604 only applies to departments or agencies, and that Section 604 cannot limit agency Section 504 actions, because Section 505(a)(2) only refers to "persons" (R. 83-84).

The limitations of language permit artful constructions that cannot withstand close scrutiny. Respondent's interpretation of Sections 505 and 604 fall into that category. If Section 604 of Title VI applies only to agencies, then private plaintiffs under Title VI could challenge personnel decisions that are neither regulated nor reviewed by the agencies charged with the administration of the statute. It is not surprising that this bizarre construction is offered without the citation of supporting authority and is disavowed by the Government.[3] Similarly, to argue that Section 604 is inapplicable to federal agencies because of its reference to "person aggrieved" is to ignore the fact that Title VI's enforcement scheme is administrative in character and requires that the rights, remedies and procedures provided by the agency be coextensive with those accorded the person aggrieved. Did Congress intend for the agencies to regulate a personnel decision about which the person aggrieved could not complain?

Under Respondent's interpretation, Congress, by enacting Section 505(a)(2) in 1978, gave handicapped employees virtually nothing. The allegedly pre-existing rights and remedies under Section 504 makes Section 505(a)(2) redundant. Indeed, although Title VI was the model upon which Section 504 was based, and Sec-

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[3] In its brief, the DOJ noted "serious doubt that such an interpretation is consistent with the purpose of Section 604," (U.S. 23 n.27). *See* Petitioner's Brief at 11-14. The only judicial decisions that have considered this issue have held that individual complaints under Title VI are limited by Section 604. *United States v. Jefferson Cty Bd. of Educ.*, 372 F.2d 836, 883 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967); *Feliciano v. Romney*, 363 F. Supp. 656 (S.D.N.Y. 1973).

tion 505(a)(2) expressly adopted the remedies, rights and procedures of Title VI for Section 504, Respondent asserts that the rights of individuals and agencies under Section 504 are far broader than those accorded under Title VI. Why, then, did Congress enact Section 505?

"In construing a statute, we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979), *quoting United States v. Menasche*, 348 U.S. 528, 538-39 (1955). This Court should not ignore Congress' express incorporation of all "remedies, rights and procedures of Title VI" into Section 504, as suggested by Respondent. Nor should this Court construe Congressional intent to accord a meaningless and superfluous remedy in the Rehabilitation Act amendments of 1978. For these reasons, based upon the plain language of the Rehabilitation Act and Title VI, Respondent should not be permitted to maintain a cause of action for employment discrimination without showing that the primary objective of the Federal financial assistance given to Conrail is to provide employment.

II. Congress Did Not Intend To Provide A Broad Cause Of Action Against All Employment Discrimination In Enacting The Rehabilitation Act of 1973

Respondent and amici repeatedly stress the overall goals of the Rehabilitation Act and isolated comments of members of Congress in asserting that Congress enacted the Act to address its primary concern with the problem of employment discrimination. (R. 61-72); (U.S. 13-14, 16-18); (AFSCME 7-10); (Cranston 4-6). If such were the case, Congress selected an exceedingly indirect way of accomplishing this goal.

At the time of the enactment of Section 504, Congress recognized that Section 504, "proclaim[ed] a policy of nondiscrimination. . . ." S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News

2076, 2123. The legislative history of the provision offers virtually no guidance as to whether Section 504 was considered a mandatory provision.[4] *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277, 1285 n.26 (7th Cir. 1977). Indeed, even the HHS recognized that "there is almost no substantive legislative history surrounding the development and enactment of Section 504. There were, for example, no public hearings accompanying the original bills and there was almost no substantive floor debate." 41 Fed. Reg. 20296 (May 17, 1976).

Respondent points to a number of comments by sponsors of the Act which she asserts demonstrate a Congressional understanding that all employment discrimination would be covered by Section 504. The majority of these statements, however, refer to Sections 501 and 503 of the Act, which specifically deal with employment discrimination. The statements concerning "unfounded discrimination in employment" by Senators Cranston and Stafford, 119 Cong. Rec. 5882-83, 5893, relate, upon closer examination, to Sections 503 and 501, respectively.[5] Similarly, Senator Cranston frequently referred to "discrimination in federal employment and under federal grants." 118 Cong. Rec. 32280, 58626; 119 Cong. Rec. 24569. Other remarks concerning the need for vo-

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[4] Congress may have intended Section 504 to reflect existing law under the Fourteenth Amendment, as enforced by 42 U.S.C. § 1983. As of 1973, several courts had utilized equal protection principles to require an appropriate education for handicapped children, *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972), and adequate education and care for the mentally retarded, *Pennsylvania Ass'n for Retarded Children v. Commonwealth*, 343 F. Supp. 279 (E.D. Pa. 1972); *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972), *aff'd in part, remanded in part*, 503 F.2d 1305 (5th Cir. 1974).

[5] In his remarks, Senator Cranston noted the requirement for an "affirmative action program to ensure that they have the right to employment. . . ." 119 Cong. Rec. 5883, which could only refer to Section 503, not Section 504. Senator Stafford's comments related to the Federal Interagency Committee on Employment established under Section 501, 119 Cong. Rec. 5893.

cational rehabilitation, 118 Cong. Rec. 30680 (Sen. Randolph); 119 Cong. Rec. 24587 (Sen. Taft), are hardly surprising in light of the primary purpose of the Act, which had been entitled previously "the Vocational Rehabilitation Act." S. Rep. No. 318, 93d Cong., 1st Sess. n.8, *reprinted in* 1973 U.S. Code Cong. & Ad. News at 2082-83.[6]

The legislative history of the 1973 Act contains no mention of a Congressional purpose to provide a far-ranging remedy against all employment discrimination.[7] Congress did not supplement Section 504 with any enforcement provisions, as it had with Title IX of the Education Amendments of 1972, and with Title VI.[8] Coupled with the lack of debate and the placement of Section 504 within the "Miscellaneous Provisions" title of the Act, the 1973 Act could hardly be said to be directed primarily at providing a remedy against employment discrimination. Congress' alleged overriding concern with such discrimination is further belied by its repeated failure, despite numerous opportunities, to amend Title VII to include handicap discrimination. *See* Appendix A to the amicus brief for the Equal Employment Advisory Council. For these reasons, it is clear that Congress did not consider Section 504 to be the

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[6] This focus upon vocational rehabilitation also explains the original definition of "handicapped individual" which was set forth in terms of employability (R. 60-61); (U.S. 13).

[7] Senator Williams' statement concerning "prohibitions against discrimination in employment in programs assisted with federal funds," 119 Cong. Rec. 24588, exidently combined the provisions of Sections 503 and 504.

[8] The Court in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), refused to apply Section 604 to Title IX, for that was the only provision that had no Title IX counterpart. With respect to Section 504, however, "[b]ecause no enforcement provisions were included in the 1973 Act, no express exemption was included either." 1977 House Hearings at 355-56.

employment discrimination panacea that Respondent and amici contend.

III. Congress Clarified The Scope Of Section 504 In The 1974 And 1978 Amendments To The Rehabilitation Act

Subsequent to the enactment of the Rehabilitation Act, Congress quickly recognized that additional legislative guidance was needed with respect to the scope of Section 504. As noted by Respondent, the definition of "handicapped individual" was amended in 1974 to apply outside of the employment context (R. 72-73). The Senate Report accompanying this amendment explained the rationale for this modification:

> *Section 504 was enacted to prevent discrimination* against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, *in relation to federal assistance in employment, housing, transportation, education, health services or any other federally aided programs.*

S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388 (emphasis supplied). The Report reflects Congressional recognition that Section 504 was intended to prevent discrimination in the context of specific federal aid programs, consistent with the operation of Title VI. Thus, federal funds given to provide employment could not be utilized to deny employment to handicapped individuals, just as federal housing funds could not be utilized to deny housing to these individuals.[9]

To fill the legislative gap in the enforcement of Section 504, Senate Report No. 1297 also called for a compliance program to be devised by administrative regula-

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[9] By enacting this amendment, Congress intended to parallel existing judicial interpretation of Title VI coverage for complaints under both Sections 503 and 504. S. Rep. No. 1297, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6389.

tion. *Id.* 1974 U.S. Code Cong. & Ad. News at 6390-91. Congress did not provide specific guidance, however, as to the scope of administrative enforcement of Section 504. As a result, HEW acknowledged that ". . . the very general language of the statute creates serious problems of interpretation . . . the statute is ambiguous as to the specific scope of [individual] rights". 41 Fed. Reg. 20296 (May 17, 1976).[10]

HEW issued final regulations governing the implementation of Section 504 in 1977, 42 Fed. Reg. 22676 (May 4, 1977), only after an Executive Order was issued directing HEW and other federal agencies and departments to issue such regulations, 41 Fed. Reg. 17871 (April 28, 1976). In the interim, Congress took no action to demonstrate its intent with regard to Section 504. Indeed, Section 504 was conspiciously absent from the list of statutes for which attorneys' fees were provided under the Civil Rights Attorneys' Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988, which included Title VI and Title IX. *See* S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908; H. Rep. No. 1588, 94th Cong., 2d Sess.[11]

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[10] Respondent asserts that regulations issued by HEW in 1974 were considered by Congress to be "reflective of underlying Congressional intent." (R. 74). These regulations, however, made no specific mention of Section 504, and certainly did not provide for any compliance program. 31 Fed. Reg. 18562, 18582 (May 28, 1974). In fact, HEW's policies were in flux between 1974 and 1977, as is evidenced by the issuance of proposed regulations in 1975 which expressly declined to establish an individual complaint procedure. 40 Fed. Reg. 24148 (June 4, 1975). These proposals were withdrawn one year later. 41 Fed. Reg. 18394 (May 3, 1976).

[11] Respondent and amici point to Senate Conference reports with respect to the Education for All Handicapped Children Act of 1975 and the Education Amendments of 1974 as evidence that Congress understood Section 504 to provide a remedy against employment discrimination by all federal grantees. (R. 76-77 n.56); (U.S. 20 n.24); (AFSCME 9-10 n.3); (Cranston 7-8 n.6). These reports suggested that certain proposals were deleted as unneces-

In 1978, Congress finally provided explicit statutory remedies for Section 504, by incorporating into Section 504 the "remedies, rights and procedures" of Title VI. Contrary to the assertions of Respondent and amici, (R. 92-93); (U.S. 25); (AFSCME 14); (Cranston 9-10), Petitioner does not contend that Congress restricted the remedies available under Section 504 by means of the 1978 Amendments. As shown above and in Petitioner's principal brief, however, Congress did not specifically provide *any* remedies until 1978. Thus, rather than limiting remedies, the 1978 Amendments clarified Congressional intent to provide the "remedies, rights and procedures" of Title VI to enforce Section 504.

The Congressional debates concerning Section 505 contain no mention of any intent to apply Section 504 as a general employment discrimination statute. Senator Javits noted, for example, that "Section 118 amends Title V of the act to provide that the remedies, procedures and rights in the Civil Rights Act of 1964 shall be available with respect to complaints under Sections 501 and 504 of the Rehabilitation Act (Section 501 concerns employment and Section 504 concerns federally assisted programs)." 124 Cong. Rec. 30315. Although Section 504 covered employment programs, the main thrust of the employment discrimination provisions continued to lie in Sections 501 and 503.[12]

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sary due to the existence of Section 504. Because these statutes do not mention Section 504, such statements merely constitute what the Committee believed Section 504 to mean, which is entitled to little weight. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980).

[12] Respondent refers to the 1978 amendment to limit coverage of alcoholics and drug abusers under Section 504 as evidence of the broad scope of that section (R. 90). This amendment, which modified the definition of "handicapped individual", only limited a remedy that Congress already understood was available to address employment discrimination under some circumstances. It should also be noted that this amendment was offered in response to agency

Respondent and amici argue that Senator Cranston objected to a proposed amendment of Section 505(a)(1) which would have limited an action brought against the federal government to equitable and affirmative action remedies in proportion to actual damages, on the grounds that it would create a lesser obligation for the federal government than for federal contractors and grantees. 124 Cong. Rec. 30577-78; (R. 91-92); (AFSCME 10); (Cranston 10 n.11). Congress apparently did not find Senator Cranston's concern compelling or even pertinent, for Section 505 now contains a limitation upon remedies only under Section 501. Indeed, in light of the Court's holding that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds," *Southeastern Community College v. Davis*, 442 U.S. 397, 411 (1979), Senator Cranston's statement was clearly in error.

Although HEW regulations on Section 504 had been issued prior to the enactment of the 1978 Amendments, the applicability of these regulations to employment discrimination regardless of the purpose of the federal funds was not discussed in Congress. Thus, while the administrative procedure under Section 504 did conform with those promulgated under Title VI, as noted by Senate Report No. 890, 95th Cong., 2d Sess. 19 (1978), there can be no question that the "rights" and "remedies" of the two sets of regulations contained a crucial distinction: to maintain an employment discrimination action, Title VI regulations required that the primary objective of the federal funding be to provide employment, while Section 504 regulations did not contain this limitation. Nothing in the legislative history indicates

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regulations and rulings under Section 503 that required federal *contractors* to hire such individuals. 124 Cong. Rec. 30822 (1978) (Sen. Cannon).

that this specific distinction was brought to the attention of Congress, nor does the legislative history support Respondent's contention that Congress intended to delete a single provision, Section 604, from the remedies, rights and procedures of Title VI incorporated into Section 504.

Respondent's principal argument appears to be that Congress could not have intended to permit employment discrimination "save in one small category of cases" (R. 41). Such a characterization misperceives the issue presented herein, which is the scope Congress intended to give Section 504 in the context of specific federal programs. Congress simply chose not to legislate with regard to the broad range of employment discrimination against the handicapped, as is evident from its refusal to amend Title VII. Respondent's assertions about the need for comprehensive statutory protection for the handicapped "is an argument to be addressed to Congress, not to this Court." *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 593 (1980). In ignoring the language of the statute, the court below substituted its policy judgment for that of Congress. Accordingly, Petitioner respectfully submits that the decision below should be reversed.

IV. The Court Below Failed To Find That Any Alleged Discrimination Occurred "Under A Program Or Activity Receiving Federal Financial Assistance"

As discussed in Petitioner's principal brief, Section 504 prohibits discriminatory practices only with respect to a particular federally funded program. *North Haven Bd. of Educ. v. Bell*, 456 U.S. at 536-39. To fall within the protection of Section 504, Respondent must demonstrate a nexus between his denial of employment and a specific Conrail program supported by Federal financial assistance. *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1235-37 (7th Cir. 1980). Because the Third Circuit rendered no findings with respect to this issue, the

decision of the court below should be remanded for further consideration.[13]

Respondent essentially argues that this Court should adopt an "institutional" approach to Section 504, *i.e.*, if the federal funding *could* be used to support activities which do not fall within a specific federal program, or if the federal funding releases other funds that could be used in support of any activity of the recipient, then discriminatory employment practices for which such funds might be applied fall within the coverage of Section 504 (R. 102-109). This interpretation is identical to the approach adopted by the Third Circuit in *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983), that the receipt of non-restricted federal funds subjects a recipient to the dictates of Section 504 with respect to all of its operations.[14] As noted in Petitioner's principal brief, every court of appeals that has considered this issue, and the DOJ, have rejected this reasoning. *See* Petitioner's Brief at 29.

The district court in this case did determine that Respondent was unable to demonstrate any connection between any alleged discrimination against him and Conrail's receipt of federal funding pursuant to Title V of the Regional Rail Reorganization Act of 1973 ("3R Act"), 45 U.S.C. §§ 771-780 (Petitioner's Appendix at 41-45). The district court rendered no express findings

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[13] A remand would only be necessary should this Court find that the litigation is not moot and that an action may be maintained under Section 504 without a showing that the primary objective of the Federal financial assistance is to provide employment.

[14] Respondent's argument that Conrail is subject to Section 504 under DOT regulations which refer to the use of funds to acquire or improve property or the application of funds to a "facility" (R. 105-107) also reflects an institutional approach. Under this theory, Conrail in its entirety would be subject to Section 504 despite the lack of any connection between, as an example, the employment of engineers and the improvement of road bed.

with regard to a nexus between the denial of employment to LeStrange and Conrail's receipt of non-restricted federal financial support in the form of debentures and Series A Preferred Stock under Section 216 of the 3R Act, 45 U.S.C. § 726. The Third Circuit did not discuss this issue. For these reasons, if it is necessary to resolve this issue the action should be remanded for further proceedings to determine whether Respondent has demonstrated the requisite nexus.

V. A Private Action Under Section 504 Should Not Permit A Monetary Remedy

Respondent and the United States apparently concede that Thomas LeStrange's death precludes an injunctive remedy, and that this action is moot unless monetary relief is available in a private action to enforce Section 504. (R. 16-39); (U.S. 26). In *Guardians, supra*, the majority held only that monetary relief is not available in a private action under Title VI in the absence of proof of intentional discrimination. The Court did not resolve the converse question. Here, Respondent seeks monetary relief of back pay and medical expenses, and the Complaint asserts intentional discrimination on the basis of handicap. J.App. A-7, A-8. Thus, the question presented under Section 504 is one not resolved under Title VI by the *Guardians* decision: whether, assuming that intentional discrimination can be shown, a private plaintiff in an action to enforce Section 504 may recover a monetary remedy? [15]

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[15] The opinions in *Guardians* concerning the relief available under Title VI and the relation to intent may be influenced by the fact that plaintiffs in that case also presented a claim under 42 U.S.C. § 1983. *See* Powell, J., concurring opinion, 103 S.Ct. at 3221; Stevens, J., dissenting opinion, 103 S.Ct. at 3221; White, J., separate opinion, 103 S.Ct. at 3228, n.17, 3232, n.32. It is noteworthy that in the majority of decisions finding a right to monetary relief under Section 504, there have been available alternative statutory bases for recovery under Section 1983 or other provisions. *See Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982); *Gregg v. Board of*

Conrail maintains that monetary relief should not be permitted in a private action under Section 504, and that the relief available should not be determined by the proof of discrimination presented. Justice White's opinion in *Guardians* suggests that in cases of intentional discrimination under Title VI, compensatory awards may be appropriate because "there can be no question as to what recipient's obligation under the program was and no question that the recipient was aware of that obligation." 103 S.Ct. at 3230.

While such certainty may be present in cases of racial discrimination in violation of Title VI, the question of whether handicap discrimination has occurred is usually less well-defined. Unlike blacks and other racial minorities, handicapped individuals form a composite, not a discrete group, which is often difficult to define under the vague definition of Section 7(7)(B). *See Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Cf. E.E. Black, Ltd. v. Marshall*, 497 F.Supp. 1088 (D. Hawaii 1980). Further, whether an employment action is discriminatory may depend upon the reasonableness of any necessary accommodations in the work place. *Southeastern Community College v. Davis*, 442 U.S. at 412-13.

There is no basis in the language of Section 504 or its legislative history for treating intent as a determinative factor concerning the availability of damages. To Conrail's knowledge, none of the lower courts which have examined the issue of monetary relief under Section 504 prior to *Guardians* have focused on the intentionality criterion.[16] Even if the Court concludes that intent de-

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Education, 535 F.Supp. 1333 (E.D.N.Y. 1982); *Hutchings v. Erie City & Cty Bd. of Dir.*, 516 F.Supp. 1265 (W.D. Pa. 1981); *Poole v. South Plainfield Bd. of Educ.*, 490 F.Supp. 948 (D.N.J. 1980). In this case the *only* basis for recovery available to Respondent is Section 504.

[16] In *Marvin H. v. Austin Independent School Dist.*, 714 F.2d 1348 (5th Cir. 1983), the Court concluded that damages are not available under Section 504 in the absence of intentional discrimination.

termines the available remedy for race discrimination under Title VI, such an approach should not be extended unnecessarily and unwisely to the area of handicap discrimination under Section 504.

Respondent argues that back pay and compensatory damages should be available to private litigants under Section 504 because back pay is a traditional equitable remedy and damages effectively induce compliance. (R. 17, 27). Yet such arguments neglect the determinative factor in deciding the available remedies to enforce a statutory right—legislative intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Conrail submits that the evidence of legislative intent strongly suggests the contrary conclusion, that Congress did not intend for monetary relief to be recovered under Section 504.

In legislation concerning handicap discrimination, Congress has carefully circumscribed available remedies. Respondent argues for remedies analogous to Title VII. (R. 22, 27). But there is no dispute that Congress has repeatedly and unequivocally rejected attempts to include handicapped individuals within the protections of Title VII, as the United States acknowledges in its amicus brief. (U.S. 14, n.19). The Cranston amici argue that such amendments were rejected because back pay was already available under the Rehabilitation Act. (Cranston 25). Such an interpretation of Congress' action is incredible given the fact that the first recorded case awarding back pay under Section 504 was decided in 1981, long after the failed attempts to amend Title VII. *See Hutchings v. Erie City & Cty. Library Bd. of Dir.*, 516 F. Supp. 1265 (W.D. Pa. 1981). Further, the 1978 amendments added Section 505(a)(1), which provided federal employees with Title VII remedies in actions under Section 501. Rather than providing Title VII remedies in actions under Section 504, Congress with Section 505(a)(2) incorporated the remedies of Title VI. It can

only be concluded that Congress deliberately chose not to give Title VII remedies to private plaintiffs under Section 504.

Respondent seeks even broader remedies than those provided under Title VII, arguing that compensatory damages should be available in Section 504 actions. (R. 23-39). As the decision in *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981) illustrates, permitting actions for compensatory damages can expose a federal grantee to liability far beyond that which can be reasonably anticipated from the acceptance of funds or that which is necessary to ensure compliance. In addition, the compensatory damages Respondent argues are available under Section 504 appear to go beyond equitable relief, and therefore, would raise the issue of the right to jury trial. *See Lorillard v. Pons*, 434 U.S. 575 (1978); *Curtis v. Loether*, 415 U.S. 189 (1974); *Doe v. Region 13 Mental Hlth.—Mental Retard. Comm'n*, 704 F.2d 1402, 1407 n.3 (5th Cir. 1983). Most importantly, there is no indication that Congress intended to provide a compensatory damages remedy under Section 504, and none should be implied.

Conrail maintains that absent evidence of Congressional intent to create a private cause of action with a monetary remedy, courts should be exceedingly hesitant to infer such a remedy. This presumption is particularly relevant to legislation enacted under the Spending Clause. *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981); *Guardians*, 103 S.Ct. at 3229 (White, J., separate opinion). Recipients of federal funds must be given an opportunity to terminate unanticipated obligations rather than accede to judicially developed compliance requirements. *Id.* Respondent would interpret Section 504 as broad remedial legislation which greatly expands the liability of federal fund recipients for discrimination against handicapped individuals. Conrail submits that there is no evidence that Congress intended that liability, and a statute enacted under the Spending Power should

not be interpreted to have such far-reaching effect in the absence of unequivocal legislative intent. If Congress wishes to enact comprehensive and remedial discrimination legislation for the handicapped, it is free to do so. To date, it has not.

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APPENDIX A

State Laws On
Handicap Discrimination In Employment

Alabama	Alabama Code, § 21-7-8 Applies to public and publicly supported employment.
Alaska remedies:	Commission on Human Relations may seek injunctive relief (§ 18.80.105), cease and desist order, hiring-rehiring, with or without back pay (§ 18.80.130).
Arizona	None (See Executive Order 77-11 (1977) state contractors and subcontractors).
Arkansas	Arkansas Stat. § 82-2901 Applies to public and publicly supported employment.
California remedies:	Cal. Gov't. Code, § 12940 Fair Employment & Housing Commission may seek injunctive relief (§ 12974), cease and desist order, hiring-rehiring, with or without back pay (§ 12970)
Colorado remedies:	Col. Rev. Stat. § 24-34-402 Civil Rights Commission may issue a cease and desist order (§ 24-34-306(9)), order hiring-rehiring, with or without back pay (§ 24-34-405).
Connecticut remedies:	Conn. Gen. Stat. Ann. § 46a-60 Commission on Human Rights may seek injunctive relief (§ 46a-89), cease and desist order, hiring-rehiring, with or without back pay (§ 46a-86).
Delaware	None
District of Columbia remedies:	D.C. Code Ann. § 1-2512 Commission on Human Relations may seek injunctive relief (§ 1-2547), issue cease and desist order, hiring-rehiring, with or without back pay, compensatory damages (§ 1-2553).

Florida remedies:	Fla. Stat. Ann. § 23.167 and § 413.08 Commission on Human Relations may issue cease and desist order and order affirmative relief (§ 23.167(13)).
Georgia remedies:	Ga. Code Ann. § 45-19-20 and § 34-6A-4 Office of Fair Employment Practices may issue cease and desist order, hiring-rehiring, with or without back pay (§ 45-19.38). Civil action for injunctive relief (§ 34-6A-6).
Hawaii remedies:	Hawaii Rev. Stat. § 378-2 Department of Labor and Industrial Relations may seek injunctive relief, cease and desist order, hiring-rehiring, with or without back pay (§ 378-5(c) & (h)).
Idaho	Idaho Code § 56-707 and Executive Order 78-4 Applies to public employment and recipients of state financial assistance.
Illinois remedies:	Ill. Ann. Stat., ch. 68, § 2-102 Commission on Human Relations may issue cease and desist order, hiring-rehiring, with or without back pay, damages (ch. 68, § 8-108)
Indiana remedies:	Ind. Code Ann. § 22-9-1-2 Commission on Human Relations may issue cease and desist order, hiring-rehiring, with or without back pay (§ 22-9-1-6(K)(1)).
Iowa remedies:	Iowa Code Ann. § 601A.6 Civil Rights Commission may issue cease and desist order, hiring-rehiring, with or without back pay, damages (§ 601A.15(8)).
Kansas remedies:	Kan. Stat. Ann. § 44-1009(a)(1). Civil Rights Commission may issue cease and desist order, hiring-rehiring, with or without back pay (§ 44-1005).
Kentucky remedies:	Ky. Rev. Stat. § 207.150(1) Commission on Human Relations may issue cease and desist order, hiring-rehiring, with or without back pay (§ 207.210(3)).

Louisiana remedies:	La. Rev. Stat. Ann. § 2254(c) Civil Action (§ 2256).
Maine remedies:	Me. Rev. Stat. Ann. tit. 5 § 4572 Commission on Human Rights may seek injunctive relief (§ 4612(4)(A) and seek civil action to include cease and desist order, hiring-rehiring, with or without back pay, civil damages (§ 4613(2)(B)).
Maryland remedies:	Md. Code Ann. art. 49B § 16 Commission on Human Relations may seek injunctive relief (art. 49B § 4), cease and desist order, hiring-rehiring, with or without back pay, damages (art. 49B § 11(e)).
Massachusetts remedies:	Mass. Gen. Laws Ann. ch. 149 § 24K & Executive Order No. 143 Fine or not more than $200; non-discrimination also applicable to state employees and in state and state assisted contracts.
Michigan remedies:	Mich. Comp. Laws Ann. § 37.1202 Civil Rights Commission may seek injunctive relief (§ 37.2603), cease and desist order, hiring-rehiring, with or without back pay, damages (§ 37.2605).
Minnesota remedies:	Minn. Stat. Ann. § 363.03(2) Department of Human Relations may seek injunctive relief (§ 363.06 Sub. 4), cease and desist order, hiring-rehiring, with or without back pay, compensatory and punitive damages (§ 363.071 Sub. 2).
Mississippi	Miss. Code Ann. § 43-6-15; § 25-9-103 Applies to public employment.
Missouri remedies:	Mo. Rev. Stat. § 296.020 Commission on Human Relations may issue cease and desist order, hiring-rehiring, with or without back pay (§ 296.040(7)).
Montana remedies:	Mont. Code Ann. § 49-2-303 Commission for Human Relations may seek injunctive relief (§ 49-2-503), cease and desist order (§ 49-2-506).

Nebraska remedies:	Neb. Rev. Stat. § 48-1104 Equal Opportunity Commission may order cease and desist, hiring-rehiring, with or without back pay (§ 48-1119(3)).
Nevada remedies:	Nev. Rev. Stat. § 613.330 Equal Rights Commission may seek injunctive relief (§ 233.180) hiring-rehiring, with or without back pay (§ 233.170).
New Hampshire remedies:	N. H. Rev. Stat. Ann. § 354-A:8 Commission for Human Rights may order cease and desist, hiring-rehiring, with or without back pay (§ 354-A:9).
New Jersey remedies:	N. J. Stat. Ann. § 10:5-4.1 Civil Rights Commission may order cease and desist, hiring-rehiring, with or without back pay, damages (§ 10:5-17).
New Mexico remedies:	N. M. Stat. Ann. § 28-1-7 Human Relations Commission may seek injunctive relief (§ 28-1-10(E)) and may order affirmative action (§ 28-1-11(E)).
New York remedies:	N. Y. Exec. Law § 296 Commission on Human Rights may order cease and desist, hiring-rehiring, with or without back pay, compensatory damages (§ 297(4)(c)).
North Carolina	N.C. Gen. Stat. § 168-6 Applies to public and private employees; private cause of action.
North Dakota remedies:	House Bill 1440 effective July 1, 1983 Commission on Human Rights may seek injunctive relief with or without back pay.
Ohio remedies:	Ohio Rev. Code Ann. § 4112.02 Civil Rights Commission may order cease and desist, hiring-rehiring, with or without back pay (§ 4112.05(a)).

Oklahoma remedies:	Okla. Stat. Ann. tit. 25, § 1302 Human Rights Commission may order cease and desist, hiring-rehiring, with or without back pay (25 § 1505(b) & (c)).
Oregon remedies:	Or. Rev. Stat. § 659.425 Commissioner of Bureau of Labor & Industries may order cease and desist (§ 659.060 (3)).
Pennsylvania remedies:	43 Pa. Cons. Stat. Ann. § 955 Human Relations Commission may order cease and desist, hiring-rehiring, with or without back pay (§ 959(F)).
Rhode Island remedies:	R. I. Gen. Laws § 28-5-7 Commission Against Discrimination may order cease and desist, hiring-rehiring, with or without back pay (§ 28-5-24).
South Carolina	Laws of 1983, Ratification No. 209, Senate Bill 394 State Human Affairs Commission enforcement including cease and desist, hiring-rehiring, and back pay and private court actions for civil damages up to $5,000 and attorney's fees and costs.
South Dakota	S.D. Codified Laws Ann. § 3-6A-15 Applies to state employment.
Tennessee remedies:	Tenn. Code Ann. § 8-50-103 Commission for Human Development may seek injunctive relief (§ 4-21-116(c)), cease and desist order, hiring-rehiring, with or without back pay, damages (§ 4-21-118 & 119).
Texas remedies:	House Bill 14-X—effective September 1, 1983 Commission on Human Rights may seek injunctive relief, hiring-rehiring, with or without back pay.
Utah remedies:	Utah Code Ann. § 34-35-6 Industrial Commission may order cease and desist, hiring-rehiring, with or without back pay (§ 34-35-7(12)).

Vermont remedies:	Vt. Stat. Ann. tit. 21, § 495 Aggrieved person or Attorney General may seek injunctive relief, including back pay.
Virginia remedies:	Va. Code § 40.1-28.7 & § 2.1-116.10 Civil Action (§ 40.1-28.7)
Washington remedies:	Wash. Rev. Code § 49.60.180 Board Against Discrimination may issue cease and desist order, hiring-rehiring, with or without back pay (§ 49.60.250).
West Virginia remedies:	W. Va. Code § 5-11-9 Commission on Human Rights may order cease and desist, hiring-rehiring, with or without back pay (§ 5-11-10).
Wisconsin remedies:	Wis. Stat. Ann. § 111.322 Department of Industry may order cease and desist, hiring-rehiring, with or without back pay (§ 111.39(c)).
Wyoming	None

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NO. 82-862

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

LEE ANN LESTRANGE DARRONE, as Administratrix of the Estate of THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMERICAN COUNCIL OF THE BLIND AND SIXTY-TWO OTHER NATIONAL, STATE AND LOCAL ORGANIZATIONS DEDICATED TO PROMOTING THE CIVIL RIGHTS OF DISABLED PERSONS IN SUPPORT OF RESPONDENT

BRIEF OF AMICI CURIAE

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NO. 82-862

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

VS.

LEE ANN LESTRANGE DARRONE, as Administratrix of the Estate of THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICI CURIAE

AMERICAN COUNCIL OF THE BLIND AND SIXTY-TWO OTHER NATIONAL, STATE AND LOCAL ORGANIZATIONS DEDICATED TO PROMOTING THE CIVIL RIGHTS OF DISABLED PERSONS IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

Amici American Council of the Blind *et al.* include 63 national, state and local membership, service and advocacy organizations that represent and serve over fifteen million disabled individuals and their families. Each Amici is actively involved in working to eliminate historical stereotypes, prejudices and the resulting discriminatory practices and policies that serve to exclude disabled people from participating as valued and contributing members of our society.

Amici know through experience that discrimination in employment is a major social impediment that adversely and severely affects the opportunity of disabled individuals to achieve integration into the social and economic mainstream. Amici recognize that the interpretation and implementation of Section 504 will, in significant part, determine the opportunities disabled people will have to be integrated into society and, therefore, submit the following brief in support of respondent. (Copies of letters from the parties consenting to the Amici filing this brief have been filed with clerk of the Court.)

National Membership, Service and Advocacy Organizations

Amicus American Council of the Blind (ACB) is the nation's largest non-profit membership organization of blind and visually impaired individuals. ACB seeks to ensure that blind people have the opportunity to participate fully in all aspects of American life and to that end works to promote strong state and federal anti-discrimination laws.

Amicus American Coalition of Citizens with Disabilities is an umbrella organization of national, state and local disability organizations representing over seven million disabled individuals.

Amicus Association for Retarded Citizens (ARC) is a national organization of over 180,000 members devoted to improving the welfare of mentally retarded citizens and their families. ARC is extensively involved in job training and placement programs for handicapped persons.

Amicus Disability Rights Center is a non-profit public interest organization created in 1976 by disabled people to strengthen the rights of disabled people through programs in education and advocacy on the federal level, with particular focus on enforcement of legislation prohibiting discrimination in employment.

Amicus Epilepsy Foundation of America is a national non-profit corporation founded in 1968 to advance the opportunities of the two million persons with epilepsy. The Foundation has a long-standing commitment to eliminating the stereotypes and prejudices which serve to exclude persons with epilepsy from employment.

Amicus National Alliance for the Mentally Ill, a national organization with 225 state and local affiliates, is a mutual support, self-help and advocacy organization that provides programs in education, community service, vocational education and support to over 130,000 mentally ill persons and their families each year.

Amicus National Association of Protection and Advocacy Systems represents the state agencies designated by the Governor of each state to protect and advocate for the rights of persons with developmental disabilities. The 54 state protection and advocacy agencies represented by the Association serve over 40,000 disabled clients per year, including representation of large numbers of disabled persons who have experienced discrimination in employment.

Amicus National Congress of Organizations of the Physically Handicapped is a national coalition of physically disabled persons and their organizations. Founded in 1958, its purpose is to secure the rights and opportunities of its members to full participation in society.

Amicus National Easter Seal Society is the nation's oldest and largest nonprofit, community-based health agency providing direct services to persons with disabilities. In 1982, through a nationwide network of 826 local affiliates, Easter Seals provided vocational and rehabilitation services to over 750,000 individuals.

Amicus National Mental Health Association is a national organization of over one million members, providing services and education through 42 state and 650 local affiliates.

Amicus National Society for Children and Adults with Autism is a national health agency dedicated to the education and welfare of children and adults with severe communication and behavior disorders.

Amicus Parents Campaign for Handicapped Children and Youth is a national organization that provides information and support to a nationwide network of over 100,000 parents of disabled children.

Amicus The Association for the Severely Handicapped has a national membership of parents, researchers, teachers, administrators and others dedicated to making education and support services available to persons with severe disabilities in order to ensure their integration into society.

Amicus United Cerebral Palsy Associations (UCPA) is a national non-profit voluntary health organization formed in 1949. UCPA assists its 225 affiliates throughout the country in the provision of rehabilitation and related direct services, education and advocacy programs, and other activities designed to promote the welfare of disabled persons.

Amicus World Institute on Disability is a nonprofit organization created by disabled persons to undertake policy analysis, research and education programs in order to eliminate discrimination and prejudicial attitudes that deny equality of opportunity and the full participation of disabled people in society.

Amicus American Civil Liberties Union (ACLU) is a nationwide non-partisan organization of over 250,000 members. The ACLU and its affiliates have a deep and continuing interest in protecting the Constitutional and statutory rights of persons with disabilities, including rights secured by Section 504.

Amicus American Federation of State, County and Municipal Employees-AFL/CIO (AFSCME) represents more than 1.4 million public employees throughout the United States, among which are over 300,000 health care workers. AFSCME has established a committee on disabled workers to promote the interests of their disabled membership.

Statewide Membership, Service and Advocacy Organizations

Amici, Advocates for Disabled Ohioans, California Association of the Physically Handicapped, Coalition of Texans with Disabilities, Handicapped United of West Virginia, Louisiana Coalition of Citizens with Disabilities, Maine Association of Handicapped Persons, People First of California and Washington PAVE are all organizations of and for disabled persons or parents of disabled children. These organizations have chapters, affiliates and membership throughout their respective states and undertake research, education and advocacy to secure the civil rights of disabled adults and children under state and federal law.

Amici CO-AD, Inc. (Idaho), Developmental Disabilities Law Center (Massachusetts), Georgia Advocacy Office, Protection and Advocacy, Inc. (California) and West Virginia Advocates for the Developmentally Disabled are all nonprofit corporations designated by the respective state Governor to protect and advocate for the rights of persons with developmental disabilities.

Amicus California State Council on Developmental Disabilities is a federally funded state agency established under federal and state law to advocate for the rights and protections guaranteed all persons with developmental disabilities.

Amicus Florida Office of Vocational Rehabilitation is a state vocational rehabilitation agency that provides services and support to physically and mentally disabled persons in order to assist them in achieving gainful employment.

Local Membership, Service and Advocacy Organizations

Amici, Adult Independence Development Center, Santa Clara, California; Boston Center for Independent Living, Boston, Massachusetts; Center for Independence of the Disabled in New York; Center for Independent Living, Berkeley, California; Center for Survival and Independent Living, Miami, Florida; Community Resources for Independent Living, Hayward, California; Dayle McIntosh Center for the Disabled, Garden Grove, California; Developmental Services of Northwest Kansas-Operation Link, Hayes, Kansas; Dutchess Center for Accessible Living, Poughkeepsie, New York; Erie Independence House, Erie, Pennsylvania; Hawaii Centers for Independent Living, Honolulu, Hawaii; Holistic Approaches to Independent Living, Denver, Colorado; Humboldt Access Project, Eureka, California; Independence Associates, Elmwood, Massachusetts; League of Human Dignity, Lincoln, Nebraska; Metro Independent Living Center, Tucson, Arizona; Rochester Center for Independent Living, Rochester, New York; Self Reliance Inc. Center for Independent Living, Tampa, Florida; Stepping Stones, Inc., Moscow, Idaho; Tri-County Independent Living Program, Portland, Oregon; and Vermont Center for Independent Living, Montpelier, Vermont, are local independent living programs operated by and for disabled persons. Each organization provides a range of independent living support services to assist severely disabled persons to live independently outside of institutions, as participating members of society.

Amici, Chicagoland Disabled Coalition, Chicago, Illinois; Council for Disability Rights, Chicago, Illinois; Disabled in Action of Greater Syracuse, Syracuse, New York; Disabled in Action of Metropolitan New York, New York; Federation of Handicapped Individuals, Des Moines, Iowa; Handicapped Information Office—Larimer County Association of the Blind and Physically Handicapped, Fort Collins, Colorado; Information and Referral Services for Persons with Disabilities, Chicago, Illinois; Maryland Alliance of Advocates with the Handicapped, Riverdale, Maryland; Parents

and Advocates for Special Education, Richmond, California; and Society's Assets Disability Coalition, Racine, Wisconsin, are all organizations of and for disabled persons or parents of disabled persons. These organizations undertake education and advocacy activities to promote the civil rights of disabled adults and children within their respective geographic areas.

SUMMARY OF THE ARGUMENT

This brief is submitted in support of the position that Section 504 of the 1973 Rehabilitation Act, as amended, 29 U.S.C. Section 794 (hereinafter cited as Section 504), was intended to broadly prohibit employment discrimination against disabled Americans by recipients of federal financial assistance. Amici will not reiterate the legislative history of Section 504 which is fully reviewed in respondent's brief. Instead, Amici will set forth an historical framework for consideration of the scope of Section 504, and will examine the governmental, sociological and psychological studies and case law which document the existence of widespread employment discrimination against disabled Americans.

In enacting Section 504 of the 1973 Rehabilitation Act, Congress realized that the same prejudices and stereotypes which prevent a potential employer from fairly evaluating the qualifications of disabled applicants and workers, operate to unjustly exclude disabled people from many other opportunities as well. Section 504 constitutes the establishment of a broad governmental policy that programs receiving federal financial assistance be operated without discrimination on the basis of handicap. To narrowly interpret the coverage of employment in Section 504, or to imply a drastic retreat in employment coverage in the 1978 amendments, belies the historical context of Section 504, undermines the very purpose of the Rehabilitation Act to promote employment opportunities, and frustrates the clear intent of Congress to insure equal opportunity to disabled Americans.

ARGUMENT

I. Disabled Americans Face Widespread Discrimination in Employment Which Congress Sought to Remedy by Passing a Broad Anti-Discrimination Statute, Section 504.

The general public does not associate the word "discrimination" with the segregation and exclusion of disabled people. Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history.

Most people are never forced to examine their assumptions or stereotypes about disabled people unless they themselves or a family member becomes disabled, or they have a disabled child. At that point the falseness of the stereotypes and the injustice of the policies based on those stereotypes become all too apparent.

What is historic about Section 504 is that it makes the examination of these stereotypes a matter of public policy. And when the stereotypes result in unfair exclusion or segregation, Section 504 recognizes it for what it is—discrimination. An understanding of the nature of prejudice and the role of stereotypes in foreclosing employment opportunities to qualified disabled Americans is necessary to fully appreciate the historic significance of Section 504.

A. When Viewed in Its Historical Context It Is Clear that Section 504 was Intended to Broadly Prohibit Discrimination Against Disabled Americans by Recipients of Federal Financial Assistance

Historically, the inferior economic and social status of disabled people was viewed as an inevitable consequence of the physical and mental limitations imposed by disability. Over the years, this assumption has been challenged by policy makers, professionals, disabled citizens, the courts

and by Congress. Gradually, disability public policy has recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory polices based on unfounded, outmoded stereotypes and perceptions and deeply embedded prejudices toward disabled people. These discriminatory policies and practices affect disabled people in every aspect of their lives.

The first major challenge to the notion that being disabled meant life-long economic dependency was prompted by the return of a vast number of disabled World War I veterans and the ever increasing incidence of industrial accidents. Recognizing the social and financial benefit of returning these injured persons to work, Congress passed the original landmark federal rehabilitation legislation, the Smith Fess Act of 1920.[1] The prevalent view of disabled people as "helpless" and "hopeless" was challenged by legislation designed to enable disabled people to become productive, contributing members of society. The passage of rehabilitation legislation embodied a clear awareness by Congress that disabled Americans shared with others the desire for "self-support—for the dignity of independence, the pride of self-reliance, and the sense of personal achievement. . . ." tenBroek & Matson, *The Disabled & the Law of Welfare,* 54 Calif. L. Rev. 809, 835 (1966). Most importantly, by the mid 1960's the explicit goal of rehabilitation policy was the integration of disabled people into the mainstream of American life.[2] This "integrationist" goal set the stage for an examination of the social barriers which impede the attainment of equal opportunity for disabled Americans.

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[1]Pub. L. No. 66-236, 41 Stat. 735. In the fifty-three years prior to the 1973 Rehabilitation Act, the program was substantially expanded in scope in 1943, 1954, 1965 and 1968. For a history of the vocational rehabilitation program, *see* S. Rep. No. 318, 93d Cong. 8-13, 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2082-86.

[2]*See* H. R. Rep. No. 432, 89th Cong., 1st Sess. 2 (1965).

From a civil rights perspective, a profound and historic shift in disability policy occurred in the 1970's.[3] Following the powerful civil rights activism of the 1960's, the 1970's produced a more fundamental change in the social and legal status of disabled people than any prior era of American history. Through landmark litigation[4] and legislation,[5] disabled Americans were recognized for the first time as a legitimate minority subject to discrimination and worthy of basic civil rights protections.

This major shift in disability public policy culminated in the passage of a broad anti-discrimination provision,

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[3]This shift in public policy is well portrayed in a statement made by Senator Williams prior to the enactment of the 1973 Rehabilitation Act.

> For too long, we have been dealing with [the handicapped] out of charity . . . . This is medieval treatment for a very current problem. . . . Most of us see the handicapped only in terms of stereotypes that are relevant for extreme cases. This ancient attitude is in part the result of the historical separation of our handicapped population. *I wish it to be said of America in the 1970's that when its attention at last returned to domestic needs, it made a strong and new commitment to equal opportunity and equal justice under law; . . . The handicapped are one part of our Nation that have been denied these fundamental rights for too long. It is time for the Congress and the Nation to assure that these rights are no longer denied.* (emphasis added). 118 Cong. Rec. 3321-22 (1972).

[4]Two landmark cases *Pa. Assoc. for Retarded Citizens* v. *Commonwealth of Pa.*, 334 F.Supp. 1257 (E.D. Pa. 1971; and *Mills* v. *Bd. of Education of the Dist. of Columbia*, 348 F.Supp. 866 (D.D.C. 1972), held that disabled children who had previously been excluded from public education had the right to a public education appropriate to their educational needs.

[5]In addition to the 1973 Rehabilitation Act, Congress enacted several other pieces of legislation designed to promote equal opportunity and integration of disabled people into the mainstream of American life. Chronologically, these statutes included: 1968—Architectural Barriers Act, 42 U.S.C. Section 4151 *et seq.* (required federally funded or leased buildings to be accessible); 1970—Urban Mass Transportation Act, 49 U.S.C. Section 1612 (required eligible jurisdictions to provide accessibility plans for mass transportation);

Section 504 of the Rehabilitation Act of 1973. Section 504 evidences Congress' recognition that while there are major physical and mental variations in different disabilities, disabled people as a group faced similar discrimination in employment, education and access to society.[6] As with racial minorities and women, Congress recognized that legislation was necessary to ameliorate wide-spread institutionalized discrimination.[7]

The historical significance of Section 504 cannot be overstated. Section 504 presents a fundamental challenge to traditional notions of disability. Section 504's anti-discrimination language acknowledges that many of the problems faced by disabled people are not an inevitable consequence of physical or mental traits themselves, but rather of the often false perceptions and prejudices others hold about those traits. Congress recognized that only a broad ban on

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1975—Education for All Handicapped Children Act, 20 U.S.C. Section 140 *et seq.* (provided that each handicapped child was entitled to a free appropriate education in the least restrictive environment); and 1975—National Housing Act Amendments 12 U.S.C. Section 1701 *et seq.* (provided for barrier removal in federally supported housing).

[6]As stated in the Senate Report accompanying the 1974 amendments to the 1973 Act:

> "Section 504 was enacted to prevent discrimination against all handicapped individuals, . . . in relation to federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided program." S. Rep. No. 1297, 93d Cong. 2d Sess. 38, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388.

[7]That Section 504 was intended to include disability within the general corpus of federal anti-discrimination law is unmistakable. As stated in the Senate Report accompanying the 1974 amendments:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, . . . and section 901 of the Education Amendments of 1972 . . . . The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. *Id.* at 39, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6390.

discrimination would realize the ultimate goal of rehabilitation legislation—the integration of disabled people into all aspects of American life.[8]

As this Court recently stated, Section 504 "confirms the federal interest in developing the opportunities for all individuals with handicaps to live full and independent lives." *Community Television of S. Cal. v. Gottfried*, 103 S.Ct. 885, 892 (1983). Nothing is more central to the Congressional goal of independence than employment. As demonstrated below, disabled Americans face widespread discrimination in seeking to secure equal employment opportunities. Hence, a restrictive interpretation of employment coverage is contrary to the very purpose of the 1973 Rehabilitation Act, and the history and language of Section 504.[9]

B. The Nature and History of Prejudice Towards Disabled People.

• • •

"But all along the disabled themselves have known that there was more to disability than a malfunctioning

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[8]Congress' understanding of the effects of employment discrimination on the goal of the Rehabilitation Act is evident from the legislative history of the 1973 Act. *See, e.g.*,

> However, if we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all—discrimination. 119 Cong. Rec. 24587 (1973) (Sen. Taft).
>
> [D]iscrimination in placement, hiring and advancement continues to limit the vocational rehabilitation program's ability to effect successful rehabilitation .... *Id.* at 5882 (Sen. Cranston.)

[9]In the intervening years between passage of Section 504 and the 1978 Amendments, Congress became increasingly aware of the problems faced by disabled Americans in seeking to secure equal employment opportunity. After hearings and review, in 1978 Congress explicitly affirmed the Section 504 regulations promulgated by the Department of Health, Education and Welfare, which included provisions prohibiting employment discrimination regardless of the purpose of the federal financial assistance. There can be no doubt that the 1978 Amendments were intended to affirm and expand civil rights protections to disabled Americans. See respondent's brief at Part III (4) and brief of amicus curiae United States at pp. 22-26.

> bodily system. They have known that this was not the only, or even the most important, of their problems . . . for being disabled, they know, means living in the world as someone "different," "abnormal," "inferior." . . . It means people shying away from you, pitying you, or rejecting you completely. It means trouble finding a job or a decent place to live. It often means living at the poverty level and going on welfare. It means *discrimination*. Being disabled is not just having a bodily defect —it is a complex social-political reality that one lives with day by day, year by year." 2 Eisenberg, Griggins & Duval, *Disabled People as Second-Class Citizens* at xii-xiv (1982).

* * *

The roots of prejudice against and stereotypes about disabled people reach far back in history and persist today. Disabled people have throughout history been regarded as incomplete human beings—"defective." In early societies this view of disabled people resulted in persecution, neglect and death.[10] These practices gradually gave way to the more humanitarian belief that disabled people should be given care and protection. Persecution was largely replaced by pity, but the exclusion and segregation of disabled people remained unchallenged.[11] Over the years, the view of disabled people as incompetent and dependent upon charity, custodial care and protection became firmly embedded in the public consciousness. The invisibility of disabled Americans was simply taken for granted. Disabled people were out of sight and out of mind.

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[10]For an historical overview of persecution of disabled people in early societies, *See* Burgdorf and Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause*, 15 Santa Clara Law. 882-86 (1975).

[11]Interestingly, a positive relationship has been established between tendencies to pity blind people on the one hand, and the tendency to espouse community segregation for the blind on the other. Lukoff & Whiteman, *Attitudes Towards Blindness*, 55 The New Outlook for the Blind 39, 42 (1961)

The discriminatory nature of policies and practices which exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of "good intentions." The innate biological and physical "inferiority" of disabled people is considered self-evident. This "self-evident" proposition has served to justify the exclusion and segregation of disabled people from all aspects of life. The social consequences which have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk—it has meant being excluded from public school,[12] being denied employment opportunities,[13] and being deemed an "unfit" parent.[14] These injustices co-exist with an atmosphere of charity and concern for disabled people.

In an earlier day, prevailing beliefs about blacks and women have supplied socially and politically potent justifications for the subordination of these groups. The "innate" differences of blacks from whites and men from women

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[12]"Many of the physically handicapped children do have the mental ability to attend public school but are denied that right due to architectural barriers and-or transportation problems." 117 Cong. Rec. 42293 (1971).

[13]*See infra* pp. 24-25.

[14]"Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent, regardless of whether affectional or socio-economic advantages could have been offered by the disabled parent." 1 Vash, *The Psychology of Disability* 155 (1981).

This issue was eloquently addressed in a landmark decision by the California Supreme Court, *Carney v. Carney*, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979). In that case the lower court awarded custody to the mother of two boys after the father was injured and became a quadriplegic. The California Supreme Court reversed, stating that ". . . the court's preconception . . . , also stereotypes William as a person deemed forever unable to be a good parent simply because he is physically handicapped. Like most stereotypes, this is both false and demeaning." *Id.* at 737, 598 P.2d at 42, 157 Cal. Rptr. at 389.

were viewed as mandating social and economic stratification. Fortunately, the following editorial in the New York Herald in 1852 can now be viewed as an historic relic:

> How did women first become subject to men as she now is all over the world? By her nature, her sex, just as the negro, is and always will be, to the end of time, inferior to the white race, and therefore, doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature. A. Kraditor, *Up From the Pedestal: Selected Writings in the History of American Feminism* 190 (1968).[15]

Unfortunately, the historic stereotypes and perceptions of disabled people have remained largely unquestioned. As explained in a seminal work by Gliedman and Roth, *The Unexpected Minority: Handicapped Children in America* 32 (1980):

> Racial tolerance begins with an assertion of the equality of all racial and ethnic groups. This assertion takes the form of a direct challenge to the racist's perceptions and the racist's theories of race difference: blacks are not "self-evidently" inferior. In contrast, the lay culture's notion of tolerance towards handicapped people takes for granted the reality of the "self-evident" inferiority of the handicapped person. Instead of challenging this vulgar prejudice, it makes its analytical point of departure the negative feelings that our naive perceptions of handicapped people often provoke in us. Yes, we say, handicapped people are indeed as helpless and incompetent as we believe them to be. But our response is unfair.
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> * * *
>
> [O]ur ordinary ideal of tolerance and fairness to the disabled reinforces society's most damaging, demean-

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[15] Similarly, in 1908 in *Muller v. Oregon*, 208 U.S. 412, 421 (1908), Justice Brewer stated, "That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious."

> ing, and unfair confusions about the nature of disability. A certain kind of paralysis may well be a permanent condition. But the social obstacles to adulthood encountered by the crippled child and adult are arbitrary, unfair, and of considerably greater importance than the biological limits to normal function that are imposed by the paralysis. *Id.* at 35.

It is only within the last decade that a fundamental challenge to traditional notions about disability has been launched. Increasingly, the social science and psychological literature has explored the implications of a socio-political definition of disability which recognizes the critical impact of social factors on the lives of disabled Americans.[16] There is a growing awareness of the similarities between racial prejudice and the prejudice experienced by disabled people.[17] And like women, disabled people have identified "paternalism" as a major obstacle to economic and social advancement.

Most importantly, Section 504 represents a direct attack on the stereotypes and prejudices which have served to exclude and segregate disabled people for centuries. Section 504 reflects a broad governmental commitment to the equal citizenship of disabled Americans. "[O]ne can only discriminate against those who *deserve* to be treated as social equals." *Id.* at 267.

C. Documentation of the Reality of Disability-Based Employment Discrimination.

Employers, like other members of the general public, hold stereotypes and prejudices about disabled people which impede their ability to objectively evaluate the qualifications of disabled applicants and workers. Disabled people face

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[16]For a look at works which have utilized the socio-political definition of disability *see* Hahn, *Disability and Rehabilitation Policy: Is Paternalistic Neglect Really Benign?* (Book Review), 42 Pub. Ad. Rev. 385 (1982); Bowe, *Rehabilitating America: Barriers to Disabled People* (1978); Gliedman & Roth, *supra* p. 14; and Eisenberg, *supra* p. 12.

[17]*See infra* note 21.

discrimination in employment in a variety of ways. Many disabled people are excluded from the outset by medical requirements which screen out all people with specific disabilities or by inflated physical or other job requirements which bear no relationship to the successful performance of the job. Disabled people who are not completely excluded at the outset are often channeled into disability-stereotyped dead-ended jobs or denied promotional opportunities. These discriminatory policies affect all disabled people, whether their disabilities are severe, moderate or perceived.

Disabled people face staggering unemployment rates. In 1972, the following statistics were revealed to Congress:

> [T]here are more than 22 million adults in the United States with physical handicaps severe enough to limit in some way their ability to work. There are more than 5.6 million persons of all ages who are mentally retarded, some proportion of which are adults. Of the 22 million with physical disabilities, an estimated 14 million could work if given the opportunity. And of the 5.6 million who are mentally retarded, 9 out of 10 could work if given proper training and rehabilitation.
>
> Actual employment figures are not so positive. . . .
>
> There are about 150,000 blind persons of working age in this country. About 50,000 of them are employed.
>
> Of the 60,000 paraplegics of working age, 47 percent are employed.
>
> Of the 400,000 epileptics of working age, the employment rate, according to best estimates, is between 15 percent and 25 percent.
>
> And of the 200,000 persons of working age with cerebral palsy, only a handful are employed.
>
> 118 Cong. Rec. 3320-21 (1972).[18]

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[18]According to 1981 and 1982 Current Population Survey studies conducted by the Bureau of the Census, the unemployment rate among disabled people who are job-ready and are currently seeking employment is nearly twice the national average. Bureau of the Census, U.S. Dept. of Commerce, *Current Population Surveys* (1981, 1982).

Particular note was taken of the high rate of unemployment among disabled Viet Nam veterans. At the end of 1971 the unemployment rate for Viet Nam veterans was 8.8%, as compared to 87.7% for disabled Viet Nam veterans. *Id.* at 2998.

The presumption that these figures reflect the actual inability of disabled people to work, is refuted by the many sociological, psychological and government studies which have documented that employment opportunities for disabled adults are severely impeded by misconceptions and generalizations about disabilities, unfounded fears about increased costs and decreased productivity, and outright prejudice toward disabled people. Of particular interest here are the findings of employment discrimination contained in a report which was authorized by Section 130 of the Rehabilitation Act of 1973, P.L. 93-112, and reported back to Congress prior to the 1978 Amendments. Urban Institute, *Report of the Comprehensive Service Needs Study* (1975) (hereinafter cited as *Needs Study*).[19] The *Needs Study* summarized existing literature on employer attitudes as follows:

> Virtually all the studies on employer attitudes have found that large proportions of employers disfavor hir-

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[19]In hearings preceding the 1973 Act, Congress heard extensive testimony on the failure of vocational rehabilitation programs to serve severely handicapped individuals. *See* S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076. In 1973, Congress ordered HEW to conduct an intensive study on the needs of this population.

The findings of the *Needs Study* were reported back to Congress in 1976. *See* testimony of *Needs Study* chief author, Jerry Turen, *Rehabilitation of the Handicapped Programs 1976: Oversite Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies Under the Rehabilitation Act of 1973 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 629-62 (1976).

Hence, prior to the 1978 amendments, Congress was affirmed in its belief that employment discrimination poses a major barrier to the equal opportunity goal of the 1973 Act.

> ing disabled people. There are strong indications that these attitudes are in large part based on non-rational, negative feelings—prejudice, in other words. *Id.* at 324.

In keeping with the historical evolution of disability public policy, the *Needs Study* recommended:

> [A] major shift in research and development emphasis toward a focus on the interaction of the individual and the barriers in the environment . . . . The major problems seem to be not so much with the severely handicapped, as with the severely handicapping environment. *Id.* at 818.

Hence, stereotypes and prejudices rather than handicaps themselves were viewed as the most potent barrier to equal employment opportunity.

While few people would openly admit to feelings of hostility towards disabled people, the persistence of deeply rooted prejudices has been well documented. In one study reported in the *Needs Study*, the author probed the attitudes of employers by asking them to rank various groups in terms of which ones they believed most employers would be more likely to hire. Colbert, Kalish & Chang, *Two Psychological Portals of Entry for Disadvantaged Groups*, 34:7 Rehab. Literature 194 (1973), *cited in Needs Study* at 314-15. The list included physically and mentally disabled groups, minority groups, controversial groups (student militants, prison parolees), old people and "neutral" groups (e.g. whites, Canadians). The study found that *"physical disability groups were clustered together and ranked lower than all minority groups and old people and higher than all . . . mentally disabled groups."* *Id.* at 315. Employers were more willing to hire student radicals or prison parolees than people who were either physically or mentally disabled. *Id.* This finding is consistent with a frequently cited study which found that all disabled groups were subject to prejudice and that personnel directors would prefer to hire a former prison inmate or mental hospital patient than an epileptic. Triandis & Patterson, *Indices of Employer Prej-*

udice Toward Disabled Applicants, 47 J. of Applied Psychology 52 (963).[20]

Numerous studies have been conducted which conclude that disabled people are subject to the same type of prejudices and discrimination as members of racial and ethnic minorities. The earliest work in this area, Barker, *The Social Psychology of Physical Disability,* 4:4 J. of Soc. Issues 28 (1948), concluded that "the physically handicapped person is in a position not unlike that of the Negro, the Jew and other underprivileged racial and religious minorities; he is a member of an under-privileged minority." *Id.* at 31.[21] In a later study, Barker specifically reported that persons with various disabilities were unable to find adequate employment as a result of "irrational prejudice." Barker, Wright, Meyerson & Gonich, *Adjustment to Physical Handicap and Illness: A Survey of the Social Psychology of Physique and Disability,* 55 Bull. of the Soc. Science Research Council (1953).

The historic roots of prejudice against disabled people are amply illustrated in a statement by K. Vernon Banta, principal employment specialist of the War Manpower Commission in 1944. *Aid to the Physically Handicapped: Hearings Pursuant to H. Res. 230 Before the Subcomm. to Investigate Aid to the Physically Handicapped of the House Comm. on Labor,* 78th Cong., 2d Sess. 1057 (1944). Mr. Banta testified before Congress regarding the widespread belief by employers and the general public that disabled persons are undesirable employees, commenting that this attitude "undoubtedly dates from the days when

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[20]Discrimination against epileptics persists despite the fact that 80 percent of people with epilepsy have their seizures fully controlled by medication. Kettle & Massie, *Need a Disability Be A Handicap?* 13:2 Personnel Mgmt. 32 (1981).

[21]*See also* Cowen, Underberg & Verillo, *The Development and Testing of an Attitudes to Blindness Scale,* 48 J. of Soc. Psychology 297 (1958); Wright, *Physical Disability—A Psychological Approach* (1960); Safilios-Rothschild, *The Sociology and Social Psychology of Disability and Rehabilitation* 111 (1970).

the disabled were destroyed instead of rehabilitated . . . ." *Id.* at 1059.

Often reflective of the employer's own prejudices are the fears about the "reaction of others" to a disabled worker. In a survey reported in *Needs Study,* employers were found to believe that paraplegics were best suited for jobs requiring a minimum of public contact. Employers feared the negative "reactions of others to the disability." Felton & Litman, *Study of Employment of 222 Men with Spinal Cord Injury,* 46 Archives of Physical Med. and Rehab. 809 (1965) *cited in Needs Study* at 321 n.32.[22]

This rationale for not hiring disabled workers persists today. In a recent case a doctor with multiple sclerosis was denied admission to a psychiatric residency program because the admissions committee feared the negative reactions of patients to his disability.[23] *Pushkin v. Regents of the Univ. of Col.,* 658 F.2d 1372 (10th Cir. 1981). The 10th Circuit found these fears to be based on general stereotypes rather than any actual information about the disabled applicant. After evaluating the evidence, the 10th Circuit

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[22]This response is reminiscent of "customer preference" cases brought under Title VII. *See e.g. Diaz v. Pan American World Airways Inc.,* 442 F.2d 385 (5th Cir. 1971).

[23]Fears of the "reactions of others" have served to justify the exclusion of disabled people from many aspects of life. In 1971 one million handicapped children were excluded entirely from public school. 117 Cong. Rec. 45974 (1971). As stated by Congressman Vanick:

> [I]n the past, the reason for excluding these children from their right to an education has never been very clear. . . . In one case a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates. *Id.*

Similarly, in 1972, Congressman Vanick commented on an airline rule which allowed carriers to "refuse transportation to 'crippled' persons on the grounds that they make passengers uncomfortable." 118 Cong. Rec. 11363 (1972).

affirmed the district court's order directing the admission of the plaintiff to the residency program.

The study referred to above on the attitudes towards and experiences with hiring paraplegics also found that most employers believed that paraplegics were best suited for non-professional jobs. This stereotype was directly contrary to the fact that paraplegics are actually found to be employed most frequently as professionals. Felton, *supra* p. 20, at 321.

Often the image of what disabled people "should" do or can do has no basis in reality. Different stereotypes attach depending on the disability involved. *See* Himes, *Measuring Social Distance in Relations with The Blind*, 54 Outlook for the Blind 54 (1960). ("Each physical disability—deafness and crippleness as well as blindness—is significantly, though differently, stereotyped." *Id.* at 55.) Another study cited in the *Needs Study* indicated "that most employers would not consider people with most kinds of disabilities for production and sales jobs, but would for clerical and, to a lesser extent, managerial jobs; (and) that over 50% of the employers would *never* consider hiring a blind or mentally retarded persons for *any* type of job. . . ." Williams, *Is Hiring the Handicapped Good Business*, 38:2 J. of Rehab. 30 (1972), *cited in Needs Study* at 312.

Discriminatory employer attitudes are manifested in a variety of ways. Most obvious is the continued use of medical standards which exclude all persons with particular disabilities from employment opportunities. The individual who has a disability which is exempted, has no opportunity to prove his/her individual abilities to perform the job. Medical standards which are not formalized in writing are utilized in practice. Disabled people are rejected for employment as a result of pre-employment medical exams which merely reveal the existence of a disability rather than any actual job-related limitation.

In a recent survey of 23 California local government jurisdictions, *Medical Standards Project: Final Report,* Employment Law Center & Disability Rights Education & Defense Fund, Inc. (1982), the following exclusionary medical standards were revealed:

> All cities and counties impose restrictions of various kinds regarding the hiring of persons with past or present epileptic conditions. . . .
>
> Virtually none of the jurisdictions seems willing to hire blind applicants. . . .
>
> The written standards for one jurisdiction prohibit the hiring of an amputee for any job unless he or she makes use of a prosthesis, even though it may not be required for success on the job. Another county will not hire an applicant for any job if he or she has lost a leg, regardless of the job-relatedness of this impairment.
>
> Many jurisdictions require routine back x-rays even though the latest medical knowledge suggests that such x-rays are useless for evaluating the present ability of asymptomatic patients to work. *Id.* at 8-9.[24]

The survey also reports that many jurisdictions exclude applicants with a history of cancer.[25]

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[24]The low predictability of low-back x-ray is examined in Rockey, Fantel, and Omenn, *Discriminatory Aspects of Pre-employment Screening: Low-back X-ray Examination in the Railroad Industry,* 5 Am. J.L. & Med. 197 (1979). Specifically, the authors conclude that of persons denied employment on the basis of low-back x-ray examinations, at least 20 percent will never have low-back pain, at least 60 percent will never lose time from work because of low-back pain, and as many as 98 percent will never require low-back surgery.

[25]A recent investigation by the Office of Civil Rights of the Department of Health and Human Services revealed extensive section 504 violations in the medical standards used to exclude disabled applicants by the Department of Social Services and Welfare of San Diego County. Letter of Finding, Dept. of Health & Human Services, Office of Civil Rights, Region IX (Nov. 7, 1980).

Seemingly more objective, but no less discriminatory, are job "requirements" which in fact bear no relation to the successful performance of the job. Moreover, "employers frequently underestimate the capabilities of disabled workers" to perform legitimate job functions. Nagi, *Work, Employment, & the Disabled,* 31 Am. J. Econ. Soc. 21 (1972), *cited in Needs Study* at 314.[26]

The *Needs Study* cited two pioneering studies which confirm that private employers, as well as state and local governments, utilize job "requirements" which bear no relationship to the successful performance of the job. Viscardi, *The Adaptability of Disabled Workers,* 2:3 Rehab. Rec. 3 (1981), *cited in Needs Study* at 326 n.45; Greenleigh Associates, Inc., *A Study to Develop a Model for Employment Services for the Handicapped* (1969), *cited in Needs Study* at 326 n. 46. Examples given are requiring employees to stand up for jobs which "can just as easily—or more easily —be performed sitting down" and requiring the "taking of written civil service tests that mentally retarded people cannot pass for jobs that they are capable of performing." *Id.* at 326. The *Needs Study* also reported a situation where "workers suffering upper limb amputations on the job were retained after a job analysis performed by the union involved discovered that, contrary to popular belief, over 80 percent of the work required on the job did not require the use of both arms." *Id.* at 804.

Outmoded stereotypes whether manifested in medical or other job "requirements" which are unrelated to the suc-

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[26]The use of stereotypes about the physical abilities of women are analogous to the stereotypes about disabled people. For example, *Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969), involved a regulation which prohibited women from lifting over 30 pounds. The court overruled the regulation because it was based on general presumptions instead of individual ability. *See also LeBlanc v. Southern Bell Telephone & Telegraph Co.,* 333 F. Supp. 602 (E.D. La., 1971), *aff'd,* 460 F.2d 1229 (5th Cir. 1972), *cert. denied,* 409 U.S. 990 (1972); *Rosenfeld v. Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971).

cessful performance of the job, or in decisions based on the generalized perceptions of supervisors and hiring personnel, have excluded many disabled people from jobs for which they are qualified. The function of federal and state anti-discrimination laws[27] is to assure that decisions are made on individual merit.

The following cases brought under these laws, which are presented below, illustrate the many ways in which discriminatory policies and practices exclude disabled Americans from employment opportunities.[28] As Congress realized in the 1973 Rehabilitation Act, without strong anti-discrimination protections, disabled people will continue to be judged on the basis of stereotypes and prejudice rather than individual ability.

Several cases have involved rules that exclude blind people. In *Gurmankin v. Costanzo*, 411 F.Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), a blind English teacher was denied a job with the Philadelphia School District because she was certified as having a "chronic or acute physical defect". The Third Circuit found this policy to be unconstitutional, noting the prevalence of misconceptions about blindness and the role of anti-discrimination laws in reversing decisions based on these misconceptions:

> Sighted persons may make erroneous assumptions of the abilities of blind persons. Legislative bodies recently have recognized that the handicapped may be victims of discrimination in such areas as housing,

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[27]Forty-six states have enacted legislation prohibiting employment discrimination against disabled persons. However, the extent of protection against discrimination extended by these statutes varies substantially from state to state depending on the definition of disability contained in the statute and the defenses extended to employers. Pres. Comm. on Employment of the Handicapped, *The Law & Disabled People* 68-80 (1980).

[28]Few Section 504 employment discrimination cases have been decided on the merits because of the split in the Circuits on the question pending before this Court.

employment, and government services. 411 F.Supp. at 985-86.

Conn. Institute for the Blind v. Conn. Comm. on Human Rights & Opportunities, 176 Conn. 88, 405 A.2d 618 (1978), involved a requirement by the Connecticut Institute for the Blind that teachers have 20/20 vision. The Connecticut Supreme Court found the school's policy to be in violation of state law, stating:

> Blanket exclusions, no matter how well motivated, fly in the face of the command to individuate that is central to fair employment practices. *Id.* at 88, 405 A.2d at 621.

Physically disabled people such as paraplegics, quadraplegics and amputees have also been deemed "unfit" for jobs regardless of individual qualifications. *Heumann v. Board of Education of the City of N.Y.*, 320 F. Supp. 623 (S.D.N.Y. 1970), dealt with the denial to the plaintiff of a license to teach in the New York City schools "on the ground that, being confined to a wheelchair as a result of poliomyelitis, she was physically and medically unsuited for teaching." *Id.* at 624.[29]

In another case involving a paraplegic, *Smith v. Fletcher*, 393 F. Supp. 1366 (S.D. Tex. 1975), *modified*, 559 F.2d 1014 (1977) the plaintiff who had a Master's degree in physiology was assigned menial clerical tasks because her supervisor had made "an arbitrary and unfounded decision as to her physical capabilities," 393 F. Supp. at 1368. The court ordered plaintiff to be promoted from a GS-9 to a GS-13, with backpay.

In *Coleman v. Casey County Board of Education*, 510 F. Supp. 301 (W.D. Ky. 1980), a bus driver was fired from his job when he had his leg amputated. The decision, which was based on a policy of excluding persons without two

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[29]The case was ultimately dismissed as moot after the Board of Education reversed itself and granted the plaintiff a license and a teaching position. Burgdorf and Burgdorf, *The Legal Rights of Handicapped Persons: Cases, Materials, and Text* 31 (1980).

legs, was contrary to the actual evidence of the plaintiff's competence. The court found that the plaintiff:

> [H]as been evaluated by several driving instructors, each of whom stated without reservation that he is a highly competent bus driver who is not hindered at all by his prosthesis. *Id.* at 303.

People with less traditional "hidden disabilities" are also excluded from employment opportunities based on unfounded fears. In *Dairy Equipment Co. v. Wis. DILHR*, 95 Wis. 2d 319, 290 N.W. 2d 330 (1980), plaintiff was hired as a truck assembler and then fired when a subsequent medical examination revealed that he had one kidney. The company admitted that the plaintiff was a good worker and that the termination decision was based solely on his medical condition. The Wisconsin Supreme Court found that the employer's fears about employee safety and extra workers compensation costs were unfounded.

In *Sterling Transit Co. v. FEPC*, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981), plaintiff's offer of a permanent position as a truck driver was revoked after a pre-employment physical examination x-ray revealed a low-back defect. The plaintiff had served in the identical position for nineteen months, had performed equivalent duties for ten years and was employed in the same capacity by another company at the time of trial. He had never had any job related back problems. Under these circumstances, the court held that the company's absolute rule against hiring persons with back deficiencies, even if not presently disabling, violated the state anti-discrimination law.[30]

The use of inflated physical requirements is illustrated in *Panettieri v. C. V. Hill Refrigeration*, 159 N.J. Super. 472, 388 A.2d 630 (1978). In that case an employer refused to re-hire a former employee after his recovery from a heart attack. After visiting the plant, the hearing officer reported that:

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[30]*See supra* note 24 on the low predictability of low back x-rays to determine future disabling conditions.

> [T]he job description and physical demand . . . is exaggerated. . . . I further find . . . , that the weights assigned to objects . . . give a distorted picture of the physical effort required on the job." *Id.* at 472, 388 A.2d at 634.

Finally, the requirement that applicants pass a written test has also been found not to be job related. In *Stutts v. Freeman,* 694 F.2d 666 (11th Cir. 1983), the 11th Circuit found that the use of a written test, as the sole criteria for a job as an equipment operator discriminated against the plaintiff who was a dyslexic (learning disabled).[31]

Employees often attempt to justify the rejection of disabled applicants by claiming that hiring disabled workers will cause decreased productivity and safety, and increased abstenteeism and costs. An examination of the literature on the actual performance of disabled workers reveals the fallacies those rationalizations contain.

According to the *Needs Study,* the best and most comprehensive study of the job performance of disabled workers was conducted by the Bureau of Labor Statistics, U.S. Dept. of Labor, and appears in Bull. No. 923, *The Performance of Physically Impaired Workers in Manufacturing Industries* (1948), cited in *Needs Study* at 318. In this study Department staff examined the employment records of 11,000 disabled and 18,000 carefully matched non-disabled workers in manufacturing plants throughout the country. Data on productivity, absenteeism, nondisabling injuries, disabling injuries and quits were abstracted. Company

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[31]Similarly, written tests and physical job requirements which are not job-related have been shown to discriminate against minorities and women. *Blake v. City of Los Angeles,* 595 F.2d 1367 (9th Cir. 1979); *U.S. v. State of N.Y.,* 475 F. Supp. 1103 (N.D.N.Y. 1979); *Ensley Branch of N.A.A.C.P. v. Seibels,* 616 F.2d 812 (5th Cir. 1980), *Firefighters Institute v. City of St. Louis,* 616 F.2d 350 (8th Cir. 1980), and *U.S. v. City of Chicago,* 549 F.2d 415 (7th Cir. 1977).

records rather than supervisor's impressions were the data source. For each disabled worker, one to three non-disabled workers were matched, not only for sex, age, and occupation but also for plant, shift, and particular job within the same plant and shift.

As reported in the *Needs Study:*

> The most important finding was that differences between impaired and unimpaired workers in any of the performance categories measured were slight. . . . Impaired workers had significantly higher *involuntary* termination (firing) rates. The authors attribute this to postwar practice of firing disabled workers to hire returning (able-bodied) war veterans. . . . *One of the conclusions that the authors draw is that the physically impaired worker is not necessarily a handicapped worker. The results of this major study are strong evidence that employers' fears of low performance rates among disabled workers are unjustified.* (emphasis added) *Id.* at 318-19.[32]

Interestingly, the authors found that many of the manufacturing plants surveyed reinstated policies against hiring disabled workers after having relaxed such policies during the war years. *See Needs Study* at 296-97. The reinstatement of exclusionary policies, despite the positive employment records of disabled workers, is strong evidence that these standards are not related either to functional skill or

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[32]For example, the study specifically stated:

> The data suggest that, . . . an orthopedic impairment left more abilities than it took away. A man who has lost an arm was not necessarily incapable of performing jobs that required the use of two hands. Nor, . . . did the survey indicate that the worker who had lost a leg necessarily had to be confined to sedentary occupations. . . . Men who had lost a hand were found engaged in machine operations or in handling materials; and workers who had lost a leg were engaged in work requiring considerable walking and moving about. Bureau of Labor Statistics, Bull. No. 923, *supra* p.27, at 59.

ability required for job performance or to a concern for the safety of workers.

Numerous studies have confirmed that employer fears that disabled workers will impair efficiency or productivity, jeopardize safety records or result in higher insurance or worker's compensation costs are unfounded. Government studies have found that handicapped workers performed as well as, or better than, their non-handicapped co-workers. U.S. Bureau of Labor Standards, Dept. of Labor, Bull. No. 234, *Workmen's Compensation and the Physically Handicapped Worker*, 5, 6-8, 20 (1961); U.S. Dept. of Labor, Bull. No. 122, *Proceedings of the National Conference on Workmen's Compensation & Rehabilitation* 19 (1950). All studies on the subject support the fact that disabled workers have as good or better safety records as non-disabled workers. U.S. Dept. of Labor, Bull. No. 122 at 8.[33] Government studies have also concluded that the employment of handicapped persons does not affect the premium rates either for non-occupational benefit plans or for workers' compensation. U.S. Bureau of Labor Standards, Dept. of Labor Bull. No. 234 at 10.[34]

Over the last twenty-five years the Dupont Corporation has conducted a number of studies on the performance of its handicapped employees. The most recent report, E. I. duPont de Nemours & Co., *Equal to the Task* (1981) (DuPont Survey of Employment of the Handicapped), concluded "Dupont studies over a period of twenty-five

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[33] *See also* Pati and Gopal, *Countdown on Hiring the Handicapped*, 57:3 Personnel J. 144 (1978); Ellner & Bender, *Hiring the Handicapped* (1980); Kalenik, *Myths About Hiring the Physcially Handicapped*, The Ca. Governor's Comm. for Employment of the Handicapped, *reprinted from Job Safety and Health* (1974); Kettle, *supra* note 20; and Pres. Comm. on Employment of the Handicapped, *A Blueprint for Action* (1980).

[34] *See also* National Institutes on Rehabilitation and Health Services, *Report of the National Workshop on Rehabilitation and Workmen's Compensation* 105 (1971); Ellner, *supra* note 33; Kettle, *supra* note 20 and Pati, *supra* note 33.

years have shown that the performance of handicapped employees is equivalent to that of their nonimpaired coworkers. In safety, job duties and attendance, the handicapped hold their own." *Id.* at 4.

As clearly demonstrated by the comparison between the studies on employers' attitudes and the studies on the actual performance of disabled workers, there is a large discrepancy between the perceived incapacity and the actual incapacity of disabled applicants and workers. Whether based on widely held misconceptions, paternalism, or prejudice, a decision not to hire or promote a qualified handicapped person constitutes discrimination.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the Court should affirm the decision below.

Respectfully submitted,

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No. 82-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
LEE ANN LESTRANGE DARRONE,
as administratrix of the Estate of
THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, THE NATIONAL ASSOCIATION OF THE DEAF, THE AFFILIATED LEADERSHIP LEAGUE OF AND FOR THE BLIND OF AMERICA, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, AND THE AMERICAN DEAFNESS AND REHABILITATION ASSOCIATION, INC.

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QUESTIONS PRESENTED BY AMICI

1. Whether a handicapped applicant for employment may maintain an employment discrimination action under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, where the primary objective of the employer's federal financial assistance is unrelated to employment.

2. Whether a private right of action exists under Section 504 of the Rehabilitation Act of 1973.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-862

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LESTRANGE DARRONE,
as administratrix of the Estate of
THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF AMICI CURIAE OF THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, THE NATIONAL ASSOCIATION OF THE DEAF, THE AFFILIATED LEADERSHIP LEAGUE OF AND FOR THE BLIND OF AMERICA, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, AND THE AMERICAN DEAFNESS AND REHABILITATION ASSOCIATION, INC.

INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] the amici file this brief in support of the respondent, Lee Ann LeStrange Darrone.

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[1] Letters of Consent to the filing of this brief are being lodged with the Clerk of the Court.

The American Federation of State, County and Municipal Employees, AFL-CIO, "AFSCME" is a labor organization which represents more than one million public employees across the country, including many disabled employees. AFSCME is committed to the eradication of all forms of employment discrimination, including discrimination against disabled people.

The National Association of the Deaf is a national non-profit organization with approximately 18,000 members who are hearing impaired adults, parents of hearing impaired children, and professionals in the area of services to deaf individuals. The National Association of the Deaf is the largest consumer organization of hearing impaired people in the United States.

The Affiliated Leadership League of and for the Blind of America is a non-profit organization consisting of eighty national, state, and local organizations of and for blind people including almost all of the national organizations of and for blind people. The Affiliated Leadership League is dedicated to advancing the rights and services for blind people especially in employment.

The American Coalition of Citizens with Disabilities was founded in 1974 to secure and enforce the civil and human rights of all people with physical and mental disabilities. The national, state and local organizational members represent virtually every category of physical and mental disability.

The Developmental Disabilities Advocacy Network (DDAN) is an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System. DDAN is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled persons, including developmentally disabled adults adversely affected by discrimination in employment by recipients of federal financial aid.

The American Deafness and Rehabilitation Association, Inc. (ADARA) is a national organization of professional rehabilitation workers with adult deaf citizens. One of the purposes of ADARA is to promote the development and expansion of professional rehabilitation services and employment opportunities for adult deaf citizens.

SUMMARY OF ARGUMENT

I

The language, legislative history and administrative interpretations of Section 504 of the Rehabilitation Act of 1973, when originally enacted and as amended in 1978, all support the coverage of employment discrimination regardless of the purpose of the federal funding. The language of Section 504 is almost identical to Section 901 [Title IX] of the Education Amendments of 1972, 20 U.S.C. § 1681. For reasons similar to this Court's analysis of Title IX in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), Section 504 "neither expressly nor impliedly excludes employees from its reach."

Throughout the legislative history of the Rehabilitation Act of 1973 and the 1978 Amendments, Congress stressed the objective to enhance employment opportunities for handicapped individuals and realized that, in order to achieve this purpose, handicapped individuals must be able to challenge employment discrimination in any program. Petitioners maintain that Section 505(a)(2) of the 1978 Rehabilitation Act Amendments incorporates the employment limitation of Section 604 of Title VI. But the language of Section 604 limits *federal departments and agencies*, not individuals, from taking action against discriminatory employment practices except where a primary objective of the federal financial assistance is to provide employment. The legislative history of Section 604 reveals it was never intended to restrict the rights of individuals, only to prevent administrative overkill.

Section 505(a)(2), which incorporated Title VI remedies, procedures and rights into the enforcement of Section 504, was intended to codify the Department of Health, Education, and Welfare's (HEW) enforcement practices. The HEW Section 504 Regulation did not adopt the limitation found in Section 604. Thus, Congress, which was aware of this Regulation, did not intend its 1978 Amendments to incorporate such a restriction. Indeed, the new Section 505 which included a provision for attorneys' fees, Section 505(b), clearly demonstrates Congress' intent "to enhance the abilities of handicapped individuals to assure compliance with the civil rights provisions of Title V." *S. Rep. No. 95-890*, 95th Cong., 2d Sess. 18 (1978). The lead Section 504 enforcement agencies, HEW and the Department of Justice, have been consistent in their interpretation that Section 504 covers employment discrimination regardless of the purpose of the federal assistance.

II

Petitioner admits that the private right of action issue was not briefed, argued or decided in either court below. *See* Petitioner's Cert. Petition at 21. Accordingly, under well-settled doctrine this Court should not consider this issue.

In any event, *Cannon v. University of Chicago*, 441 U.S. 677 (1979) and *Guardians Association v. Civil Service Commission of the City of New York*, No. 81-431, 51 U.S.L.W. 5105 (U.S. July 1, 1983), compel the conclusion that Section 504 confers a private right of action. This conclusion is consistent with all federal courts of appeals that have ruled on the issue. Moreover, consideration of all four factors identified in *Cort v. Ash*, 422 U.S. 66, 78 (1975), to determine whether a private remedy is to be implied, shows that Congress intended Section 504 to confer a private right of action in favor of handicapped individuals.

Petitioners further argue that if a private right of action does exist under Section 504, an individual can obtain only injunctive, not monetary relief. This issue of relief under Section 504 was neither raised nor considered in the courts below. The application of *Guardians Association* to the issues of whether an intent to discriminate exists in this case or whether an intent to discriminate ever is a requisite to compensatory relief under Section 504 depends upon a proper record. Since there is no record on these issues in the courts below, this Court cannot consider them now.

Petitioner's program-specificity argument was likewise neither raised nor considered in the lower courts. No evidence was taken on whether federal money went to the particular program in which respondent was employed. Under this Court's established practice, this issue should be remanded.

ARGUMENT

I. SECTION 504 PROHIBITS EMPLOYMENT DISCRIMINATION REGARDLESS OF THE PURPOSE OF THE FEDERAL FINANCIAL ASSISTANCE.

The major purpose of the Rehabilitation Act of 1973 was to significantly expand employment oportunities for disabled people. Congress recognized that in order to achieve this goal, discrimination must be eliminated. Congress passed Title V, including Section 504, to root out this discrimination. Section 505 of the 1978 Amendments to the Rehabilitation Act expanded the remedies available for disabled people to combat discrimination, especially in employment. The language, legislative history and administrative interpretations of Section 504 and its amendments all support its coverage of employment discrimination without regard to the purpose of the federal funding.

A. Section 504 On Its Face Prohibits Employment Discrimination.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended, provides, in pertinent part:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity receiving federal financial assistance* . . ." (emphasis added)

The statute itself applies to *any* programs receiving federal aid. Nothing in this language indicates that it was intended to reach only those programs receiving federal financial assistance for the primary purpose of providing employment. *See Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1379 (11th Cir. 1982), *petition for cert. pending*, No. 82-1159 (filed Jan. 11, 1983).

In *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), this Court reviewed the same question under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686, a statute with language almost identical to Section 504. This Court first looked at the language of the statute itself to determine whether it includes employment:

> "Section 901(a)'s broad directive that 'no person' may be discriminated against on the basis of gender appears, *on its face*, to include employees as well as students. Under that provision, employees, like other 'persons', may not be 'excluded from participation in', 'denied the benefits of,' or 'subjected to discrimination under' education programs receiving federal financial support." (emphasis added)

North Haven, 456 U.S. at 520.

Just as Title IX's inclusion of "person" thereby includes employees, so too, Section 504's coverage of "other-

wise qualified handicapped individuals" includes employees. This is especially true in a statute that links vocational training with equal opportunity guarantees. Both Section 504 and Title IX are remedial civil rights statutes in origin, and therefore must be accorded a "sweep as broad as [their] language." *See North Haven*, 456 U.S. at 521; *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 677 (8th Cir. 1980) (opinion of McMillian, J., concurring).

Based on the reasoning used in *North Haven*, the Third Circuit in this case found as follows:

> "The statutory language of § 504 of the Rehabilitation Act and § 901 of Title IX being virtually identical, we are bound to conclude, like the Supreme Court in *North Haven*, that because § 504 'neither expressly nor impliedly excludes employees from its reach, we should interpret the provision as covering and protecting these 'persons' unless other considerations counsel to the contrary.'"

LeStrange v. Consolidated Rail Corp., 687 F.2d 767, 769-770 (3d Cir. 1982). *See also Jones*, 681 F.2d at 1379.

B. The Legislative History Of Section 504 Supports Coverage Of Employment.

1. *The original enactment of Section 504.*

The Rehabilitation Act of 1973 had as its purpose to "promote and expand employment opportunities in the public and private sector for handicapped individuals and to place such individuals in employment."[2] 87 Stat. 357;

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[2] So clear was Congress' purpose in enacting the Rehabilitation Act, that the original 1973 Act defined "handicapped individual" exclusively in terms of employability:

> "A handicapped individual is any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employ-

see 29 U.S.C. § 701; *see also* 119 Cong. Rec. 24587-88 (1973) (statement of Senator Williams, sponsor of the bill and chairman of the Committee on Labor and Public Welfare.

All four sections of Title V create strong protections for handicapped individuals' employment rights. Sections 501 and 503 of Title V require the federal government and federal contractors, respectively, to take affirmative action in hiring and promoting handicapped individuals. *See* 29 U.S.C. §§ 791 and 793. Focusing solely on employment, these two sections contain no exception regarding the purpose of the federal funding. Section 502 of Title V, 29 U.S.C. § 792, created the Architectural and Transportation Barriers Compliance Board to enforce the Architectural Barriers Act of 1968, 42 U.S.C. §§ 4151-4157, which prohibits architectural barriers in federal and federally assisted buildings and facilities which may serve as employment sites for handicapped individuals. Congress also sought to remove transportation barriers that impede handicapped persons from going to work. *See* 29 U.S.C. § 792(c). Section 504, which prohibits discrimination by federal grantees, *in any program or activity*, was also intended to cover employment, without exception.

> "It is hard to imagine, in an Act whose primary goal is to enhance the vocational capabilities of the handicapped, that if the legislature had intended to limit the reach of a provision which immediately follows

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ability from vocational rehabilitation services provided pursuant to Titles I and III of this Act."

Section 7(6); 87 Stat. 361.

In 1974, Congress amended the definition of "handicapped individual" since it realized that Section 504 covered not only employment discrimination but other forms of discrimination as well. *See S. Rep. No. 1297*, 93d Cong., 2d Sess. 37 (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 6373, 6387; *S. Rep. No. 93-1139*, 93d Cong., 2d Sess. 23 (1974).

> two sections whose express purpose is to encourage the hiring of the handicapped, that someone somewhere in the legislative history would have said so. On the contrary, several members indicated the opposite."

LeStrange, 687 F.2d at 773-774.

Congress clearly intended Section 504 to have a broad sweep, particularly with regard to employment.[8] *See* 119

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[8] Further support for this interpretation of employment coverage under Section 504 is found in the legislative history of two other acts.

During the enactment of the Education Amendments of 1974, Pub. L. 93-380, 20 U.S.C. §§ 1221-1233, the House Committee proposed Section 807, which would forbid discrimination against physically handicapped individuals in their attempts to secure employment as teachers in any federally funded program administered by the Office of Education. *See H.R. Rep. No. 93-805*, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 4093, 4155. In the Senate Conference Report, it was explained that this proposed section would not be included in the bill, *"because section 504 of the Rehabilitation Act of 1973, which is now in effect, prohibits such discrimination."* (emphasis added). *S. Rep. No. 93-1026*, 93d Cong., 2d Sess. (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 4206, 4250.

In enacting the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1461, the Conference Report stated:

> "It is clear that qualified handicapped individuals who, because of their handicap, are refused employment by recipients of assistance under the Act *are fully covered by the prohibition in section 504 of the Rehabilitation Act of 1973*. The conferees expect that the Department of Health, Education, and Welfare regulations implementing section 504 will cover employees of such recipients of Federal assistance under this Act." (emphasis added).

S. Rep. No. 94-455, 94th Cong., 1st Sess. 54 (1975), *reprinted in* [1975] U.S. Code Cong. and Ad. News 1480, 1504.

While these two acts do not involve Section 504 itself, their clear discussion of the scope of employment coverage under Section 504 indicates further Congressional intent that Section 504's scope not be limited to situations where the purpose of the federal funds is for employment. Subsequently enacted legislation declaring the in-

Cong. Rec. 5882 (statement of Senator Cranston); *id.* at 24587 (statement by Senator Taft); *id.* at 5887 (statement of Senator Javits).

2. *The 1978 Amendments to the Rehabilitation Act and their legislative history.*

Throughout the debates of the 1978 Amendments Congress understood that Section 504 was intended to cover employment discrimination by federal grantees. For example, in response to a proposed amendment by Senator McClure, to limit a court's remedies pursuant to Section 501, Senator Cranston responded:

> "The amendment offered . . . would create an unwise and unrealistic distinction with respect to employment between the obligations of the Federal Government and the obligations of Federal contractors and *grantees.* Ironically, the Senator's amendment would limit—with a financial test—the Federal Government's obligation of being an equal opportunity employer. *Federal* contractors and *grantees would—appropriately—continue to be required to be equal opportunity employers.*"

124 Cong. Rec. 30577-78 (1978). (emphasis added) *See LeStrange*, 687 F.2d at 775.[4]

This statement demonstrates that the chief sponsor of the 1978 Amendments considered that both Section 503 and Section 504 required equal opportunity in employment.

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tent of an earlier statute is entitled to great weight in statutory construction. *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962); *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

[4] Discussions indicating Section 504's employment coverage also took place regarding a further amendment to the definition of handicapped individual, to exclude current alcohol or drug abusers from Section 504 coverage if such use prevented an individual from performing the duties of the job in question. *See* 124 Cong. Rec. 30323, 30324 (1978); *see also* 29 U.S.C. § 706(7)(A).

Further evidence of the scope of employment protection under Section 504 is found throughout the debates on the 1978 Amendments. *See H.R. Rep. No. 95-1149*, 95th Cong., 2d Sess. 16, 18, 23-29, 34, 38, 42-43 (1978); *H.R. Rep. No. 95-1188*, 95th Cong., 2d Sess. 4 (1978); *S. Rep. No. 95-890*, 95th Cong., 2d Sess. 8, 13, 20-21, 27, 36 (1978); *H.R. Conf. Rep. No. 95-1780*, 95th Cong., 2d Sess. 80-81, 94-96, 98, 102 (1978); 124 Cong. Rec. 30304 (1978) (remarks of co-sponsor Senator Randolph; *id.* at 30313-16 (remarks of Senator Javits); *id.* at 30327 (remarks of Senator Dole); *id.* at 37505-06 (remarks of Senator Randolph); *id.* at 13896-97 (remarks of Representative Brademas); *id.* at 13898-99 (remarks of Representative Biaggi); *id.* at 13902 (remarks of Representative Jeffords); *Rehabilitation Amendments of 1978 Hearings*, 95th Cong., 2d Sess. 93, 122, 179-84, 243-44 (1978).

C. Section 505(a)(2) Of The 1978 Rehabilitation Act Amendments Does Not Impose A Limitation To Section 504's Coverage Of Employment Discrimination.

Petitioners maintain that employment discrimination is only covered by Section 504 if a primary purpose of the federal funds received is to provide employment. They rely on the reasoning expressed in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), and adopted by three other federal courts of appeals.[8] In *Trageser*, the Fourth Circuit interpreted Section 505(a)(2) of the 1978 Rehabilitation Act Amendments[9] to limit employment cover-

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[8] *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir.), *cert. denied*, 449 U.S. 892 (1980); *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982), *petition for cert. pending*, No. 82-5812 (filed Nov. 22, 1982).

[9] Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 29 U.S.C. § 794a(a)(2).

age under Section 504 to those situations where "a primary objective of the federal assistance is to provide employment". 590 F.2d at 89.

Section 505(a)(2) provides as follows:

> "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by an act or failure to act by any recipient of Federal assistance. . . ."

The Fourth Circuit concluded that the above language incorporated Section 604 of Title VI, which states:

> "Nothing contained in this subchapter shall be construed to authorize action under this subchapter *by any department or agency* with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment."

Section 604, 42 U.S.C. § 2000d-3 (emphasis added).

The *Trageser* court thereby applied Section 604's limitation on *federal departments and agencies* to *individuals* challenging employment discrimination under Section 504.

The purpose, language and legislative history of section 505 refute this severe limitation of Section 504's employment coverage. Congress never intended that federal money would be used to support employment discrimination by federal grantees. *See LeStrange*, 687 F.2d at 772-74; *Jones*, 681 F.2d at 1380-81.

1. *The purpose of Section 505(a)(2).*

The purpose of Section 505(a)(2) was to codify HEW's existing practice of extending the procedural provisions of Title VI to the enforcement of Section 504. As originally enacted, Section 504 did not specify enforcement procedures. Congress, however, expressed its intent in 1974 that a compliance mechanism be established similar to that in effect under Titles VI and IX:

> "The language of section 504, in following the above-cited Acts [section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000 d-1, and section 901 of the Education Amendments of 1972, 20 U.S.C. § 1683], further envisions the implementation of a compliance program which is similar to those Acts, including promulgation of regulations providing for investigation and review of recipients of Federal financial assistance, attempts to bring non-complying recipients into voluntary compliance through informal efforts such as negotiation, and the imposition of sanctions against recipients who continue to discriminate against otherwise qualified handicapped persons on the basis of handicap."

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 40 (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 6373, 6390.

Regulations to implement the above-stated purpose were issued by HEW in 1977 pursuant to Executive Order 11914, 41 Fed. Reg. 17871 (1976). These regulations, which specifically prohibit employment discrimination, incorporated the procedural provisions of Title VI. In promulgating these regulations, HEW noted that the Section 504 regulations and Title VI regulations differed "in the extent to which it [Section 504] applies to employment practices." *See* 41 Fed. Reg. 29547-48 (1976).

In enacting Section 505(a)(2) in 1978, the Senate Committee specifically noted these HEW regulations and stated the purpose for the amendment:

> "It is the committee's understanding that the regulations promulgated by the Department of Health, Education and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under Title VI. Thus, this amendment codifies existing practice as a specific statutory requirement."

S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978), *reprinted in* [1978] U.S. Code Cong. and Ad. News 7312.

The Eleventh Circuit in *Jones* further explained Congress' reason for adopting Section 505(a)(2):

> "Thus Section 505 was intended to encompass only those remedies, procedures and rights of Title VI found in the HEW regulations. Since the HEW regulations did not utilize or mention the restrictions found in Section 604 of Title VI, Congress obviously did not intend Section 505 to incorporate such a restriction into the Rehabilitation Act."

Jones, 681 F.2d at 1382.

2. *Section 505 expands the remedies available to handicapped individuals.*

Section 505(a)(2) of the 1978 Amendments is found in Section 505, entitled "Remedies and Attorneys' Fees". This section strengthens the ability of handicapped individuals to enforce their rights under Title V. Section 505(a)(1) extends powerful Title VII procedural remedies to handicapped federal employees and applicants, *see* 29 U.S.C. § 794a(a)(1), while Section 505(b) provides for attorneys' fees to encourage private suits under Section 504. *See* 29 U.S.C. § 794a(b). These provisions of Section 505 demonstrate Congress' intent to expand remedies available to handicapped persons to combat discrimination, not restrict them.

This intent to strengthen remedies is further shown in the 1978 legislative history. The Senate Report indicates that the new provisions of Section 505 are "designed to *enhance* the ability of handicapped individuals to assure compliance with the civil rights provisions of Title V." *S. Rep. No. 95-890*, 95th Cong., 2d Sess. 18 (1978). *See id.* at 19, 55. This view was reiterated by sponsors of the 1978 Amendments in Congressional floor debates. *See, e.g.*, 124 Cong. Rec. 30347 (statement by Senator Cranston); *id.* at 30311 (statement by Senator Stafford); *id.* at 30303 (statement by Senator Randolph); *id.* at 13901 (statement by Congressman Jeffords). *See also Scanlon*

v. Atascadero State Hospital, 677 F.2d 1271, 1274-75 (9th Cir. 1982) (opinion of Ferguson, J., dissenting); *Hart v. County of Alameda*, 485 F.Supp. 66, 70-71 (N.D. Cal. 1979).

If Congress had intended to narrow the rights available to handicapped individuals pursuant to Section 504, it would have done so specifically. Congress has shown in the legislative history of Title IX that if it intended to limit employment coverage by Section 604 of Title VI, it would have said so directly. When the House tried to limit employment coverage under Title IX, they proposed an amendment, Section 1004, that tracked the language of Section 604 verbatim. The House receded on this amendment in the Conference Committee. *S. Conf. Rep. No. 92-798*, 92 Cong., 2d Sess. 221 (1972); *H.R. Conf. Rep. No. 92-1085*, 92d Cong., 2d Sess. 221 (1972). *See also North Haven*, 456 U.S. at 528. Congress did not attempt to write this specific limitation into the 1978 Amendments. Congress had no intention of changing the substantive coverage of Title V, only to codify what it had earlier suggested as an appropriate mechanism for Section 504's enforcement.

3. *The language of Section 505(a)(2).*

The plain language of Section 505(a)(2) indicates that it is intended to expand the "remedies, procedures and rights" available to handicapped individuals to challenge discrimination, not to limit them by imposing the severe restrictions of Section 604. Congress envisioned the extension of Title VI remedies and procedures for effecting compliance with 42 U.S.C. § 2000d, as set forth in 42 U.S.C. § 2000d-1, and the right to judicial review of administrative agency actions, as set forth in 42 U.S.C. § 2000d-2.[7] *See* discussion of above terms and their legal

[7] Several other sections of Title VI are inapplicable in the Section 504 context, e.g., 42 U.S.C. §§ 2000d-5 and 6, further demonstrating that not all Title VI provisions were intended to be incorporated into enforcement of Section 504.

meaning in *Jones*, 681 F.2d at 1381, n.12; *Cabrini*, 497 F.Supp. 95, 96 (S.D.N.Y. 1980).

The very fact that the language of Section 505(a)(2) says Title VI remedies "*shall be available to*" persons aggrieved under Section 504, demonstrates Congress' intention to provide an expanded enforcement mechanism, not a more restricted one.

4. *The restrictions of Section 604 apply to federal departments and agencies, not to individuals.*

The language of Section 604, as stated above, limits its application to *federal departments and agencies.* Yet the Fourth Circuit in *Trageser* ignored this language, and with no analysis, "simply read these words out of the statute." *See Scanlon*, 677 F.2d at 1276 (opinion of Ferguson, J., dissenting). The *Trageser* court then took the remaining language of Section 604 and applied it to actions brought by private parties under Section 504.

> Section 604 does not, on its face, apply to private individuals. Accordingly, even were Section 604 deemed applicable to suits under the Rehabilitation Act, it would seemingly apply only to suits brought by federal agencies or departments and not suits brought by private individuals."

Jones, 681 F.2d at 1379, n. 7. *See also Carmi*, 620 F.2d at 678 (opinion of McMillian, J., concurring); *Hart*, 485 F.Supp. at 72.

Congress enacted Section 604 because of its concern that upon a single employment violation, federal agencies might threaten the existence of important programs by invoking their power to cut off funds. *See LeStrange*, 687 F.2d at 778 (opinion of Weiss, J., concurring). Section 604's purpose was to limit this powerful government sanction which a department or agency can apply against a recipient. Senator Hubert Humphrey, a sponsor of the Civil Rights Act of 1964, emphasized that individuals

can go to court to enforce their employment rights under Title VII, 42 U.S.C. §§ 2000e-2000e-17, but that Section 604 was specifically designed to restrict fund cut-offs by "preclud[ing] action by a Federal agency under Title VI." 110 Cong. Rec. 12720 (1964); *see also id.* at 5255. Thus, Section 604 was never intended to restrict the rights of private parties, only to prevent "administrative overkill." *LeStrange*, 687 F.2d at 778 (opinion of Weiss, J., concurring). Similarly, Section 604 cannot be read to limit the actions of individuals pursuing their rights under Section 504.

5. The structure of Section 505 demonstrates Congress' intent to promote administrative efficiency in the enforcement of Title V's provisions.

The Fourth Circuit in *Trageser* found further support for its narrow view of employment rights under Section 504 in Section 505(a)(1) of the 1978 Amendments, 29 U.S.C. § 794a(a)(1), which extended Title VII remedies to the enforcement of Section 501 of the Rehabilitation Act. The *Trageser* court erred in reasoning that Congress' failure to extend Title VII remedies to Section 504 complainants as it did to Section 501 complainants indicates a congressional intent not to cover employment under Section 504. To the contrary, since Section 501 deals solely with (federal) employment discrimination, Congress logically chose Title VII remedies. Title VII was adopted to provide individuals remedies to employment discrimination and it is enforced by the Equal Employment Opportunity Commission (EEOC), which handles similar issues in other employment areas.

Section 504, on the other hand, reaches all forms of discrimination against handicapped people such as housing, education, and health care. This wide coverage is patterned after Title VI's ban on discrimination in all programs and activities receiving federal financial assistance. It was only natural that Congress would, therefore, look to Title VI remedies for enforcement of Section 504.

See Hart, 485 F.Supp. at 72-73. Congress realized that extending Title VII remedies to Section 504 would require the EEOC, for the first time, to resolve non-employment issues. Other funding agencies have routinely made these determinations in race and sex cases pursuant to their Title VI and Title IX responsibilities. Congress thus concluded it would be administratively consistent to follow Title VI remedies for violations of Section 504. The Senate Committee that wrote Section 505(a)(2) confirmed this view when they stated that applying the procedural provisions of Title VI to Section 504 would assure "administrative due process, and provide for administrative consistency within the Federal Government." *S. Rep. No. 95-890*, 95th Cong., 2d Sess. 19 (1978). *See also S. Rep. No. 93-1297*, 93d Cong., 2d Sess. 39-40 (1974), *reprinted in* [1974] U.S. Code Cong. and Ad. News 6373, 6390.

6. *The postenactment history of Section 504 rejects* Trageser.

The postenactment history of Section 504 is extremely valuable in determining Congressional intent. Congress' failure to repeal or amend HEW's interpretation connotes acquiescence in the agency's interpretation.[8] *See North Haven*, 456 U.S. at 531-33; *Cannon v. University of Chicago*, 441 U.S. 677, 687, n.7 (1979). Moreover, the many positive statements by legislators support the above interpretation of employment coverage under Section 504.

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[8] In 1977 Congress held oversight hearings on the implementation of Section 504. Throughout these hearings, legislators discussed Section 504, its coverage of employment, and the recently promulgated HEW Section 504 regulations. *See Implementation of Section 504 of the Rehabilitation Act of 1973: Hearings before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong., 1st Sess. 51-57, 63-64, 68, 71, 73-74, 207, 214-15, 241, 243, 247, 253-54, 259, 294-95, 303, 315-19, 341, 426-30, 460-63, 464, 470 (1978). At that time, as in 1978, Congress knew of HEW's interpretation of Section 504 as covering employment regardless of the purpose of the federal funding, and made no attempt to limit its scope.

> "Although the statements of one legislator made during debates may not be controlling, . . . , Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction. *See* eg., *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such statements 'deserve to be accorded substantial weight . . . .')."

North Haven, 456 U.S. at 526-27.

Indeed, as indicated above, it was the statements of not just one, but many legislators, demonstrating the broad scope of Section 504's coverage of employment discrimination without the limitations imposed by *Trageser*.

In 1979, the *Trageser* analysis was specifically criticized by the Senate Committee on Labor and Human Resources, the Committee which reported out the original act and the 1978 Amendments:

> "[*Trageser*] is not consistent with Congress' original and continuing intent that handicapped individuals be empowered to bring suit in Federal District Court for alleged employment discrimination in violation of title V regardless of the designated use of the Federal funds received by the employer in question."

S. Rep. No. 316, 96th Cong., 1st Sess. 13 (1979); *see Scanlon*, 677 F.2d at 1273 (opinion of Ferguson, J., dissenting); *LeStrange*, 687 F.2d at 776.

D. Administrative Interpretations Of Section 504 Support Coverage Of Employment Discrimination Without Regard To The Purpose Of Federal Funding.

The administrative agencies which have promulgated regulations to enforce Section 504 have been consistent in their coverage of employment discrimination regardless of the purpose of the federal assistance. The Department of Health, Education, and Welfare, the lead agency in coordinating enforcement of Section 504, promulgated

regulations which specifically covered employment. 45 C.F.R. Part 84, subpart B.

The Department of Justice, which in 1980 was transferred the authority to coordinate enforcement of Section 504, *see* Executive Order 12250 (1980), reviewed the legislative history of the Rehabilitation Act and its amendments, HEW's administrative construction, the remedial nature of Section 504 and the legislative history of Section 505, before rejecting the *Trageser* analysis. *See* 28 C.F.R. §§ 42.501-.540 (1980).

> "In construing a statute, this Court normally accords great deference to the interpretation . . . of the agency charged with the statute's administration. *See*, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381 (1969)."

North Haven, 456 U.S. at 522, n.12. *See also Udall v. Tallman*, 380 U.S. 1, 16-18 (1965).

Recently in *Guardians Association*, Justice White pointed out:

> ". . . [W]e should not reject them [Title VI regulations] absent clear inconsistency with the face or structure of the statute, or with the unmistakable mandate of the legislative history."

51 U.S.L.W. at 5108.

In this case, both the language of the statute and the legislative history support the administrative interpretations of Section 504 covering employment.

II. SECTION 504 CONFERS A PRIVATE RIGHT OF ACTION.

Petitioner admits that it did not argue in the courts below that Section 504 provides a private right of action "because the law in the Third Circuit and other circuits on this question appeared to be well settled." Petitioner's Cert. Petition at 21. Now Petitioner is raising in this

Court the issue of a private right of action. It is established that this Court will not consider issues that are not raised before or considered by the District Court or the Court of Appeals. *Miree v. Dekalb County*, 433 U.S. 25, 33-34 (1977); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970).

In any event, all courts of appeals that have decided the issue have held that Section 504 confers a private right of action.[9]

A. *Cannon* And *Guardians Association* Compel The Conclusion That Section 504 Confers A Private Right Of Action.

This Court held in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that Title IX of the Education Amendments of 1972 confers a private right of action. *Cannon* is especially applicable to the present case for at least two important reasons. First, Section 504 "was patterned after, and is almost identical to . . . section 901 [Title IX] of the Education Amendments of 1972. . . ." *S. Rep. No. 93-1270*, 93d Cong., 2d Sess. 27 (1974). Second, the administrative procedures for enforcement under Section 504 are identical to those used to enforce Title IX. *See* 45 C.F.R. §§ 84.61 and 84.71.

Recently, in *Guardians Association v. Civil Service Commission of the City of New York*, No. 81-431, 51 U.S.L.W. 5105 (U.S. July 1, 1983), this Court noted the existence

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[9] *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981); *Lloyd v. Regional Transportation Auth.*, 548 F.2d 1277 (7th Cir. 1977); *United Handicapped Federation v. Andre*, 558 F.2d 413 (8th Cir. 1977); *Kling v. City of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Pushkin v. Regents of Univ. of Colorado*, 658 F.2d 1372 (10th Cir. 1981).

of a private right of action under Title VI, *see* 51 U.S.L.W. at 5108-09, which is analogous to Section 504. *See* pp. 13, 19, *supra*.

B. A Private Right Of Action Can Be Implied Under *Cort v. Ash*.

Even if *Cannon* and *Guardians Association* are not viewed as dispositive, consideration of the four factors identified in *Cort v. Ash*, 422 U.S. 66, 78 (1975), to determine whether a private remedy is to be implied, shows that Congress intended Section 504 to confer a private right of action in favor of handicaped individuals.

First, respondent is "one of the class for whose *especial* benefit the statute was enacted." *Cort*, 422 U.S. at 78. The Senate Committee Report on the 1974 Amendments to the Act proclaimed, "Section 504 was enacted to prevent discrimination against *all handicapped individuals* . . . in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs." *S. Rep. No. 1297*, 93d Cong., 2d Sess. 38 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 6373, 6388 (emphasis added). *See also Kampmeier v. Nyquist*, 553 F.2d at 299 ("Section 504 . . . is designed specifically for their protection"); and *Lloyd v. Regional Transp. Auth.*, 548 F.2d at 1285, n. 25.

Section 7(7) of the Rehabilitation Act, 29 U.S.C. 706(7), *as amended*, defines "handicapped individual" as any person who:

> "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."

Thomas LeStrange's partial amputation of his forearm qualified him as a "handicapped individual" with the

meaning of Section 7(7). He therefore meets the first *Cort* factor.

Second, the Rehabilitation Act and its legislative history show that Congress intended to create a private remedy under Section 504. *See Cort*, 422 U.S. at 78. The Committee Report on the 1974 Amendments states that:

> "This approach to implementation of section 504, which closely follows the models of [Title VI and Title IX] . . ., would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*"

S. Rep. No. 93-1297, 93d Cong., 2d Sess 40 (1974) (emphasis added).

This intent is confirmed by the addition of an attorney's fee provision to Title V of the Act in the 1978 Amendments, Section 505(b), 29 U.S.C. § 794(b). The legislative history underlying this attorneys' fee provision supports this reading. The Senate report on Section 505(b) states:

> "The committee believes that the rights extended to handicapped individuals under title V, that is, Federal Government employment, physical accessibility in public buildings, employment under Federal contracts, and *nondiscrimination under Federal grants*—are, and will remain in need of constant vigilance by handicapped individuals to assure compliance, and the *availability of attorney's fees should assist in vindicating private rights of action* in the case of section 502 and 503 cases, *as well as those arising under section 501 and 504.*"

S. Rep. No. 95-890, 95th Cong., 2d Sess. 18 (1978) (emphasis added).

A similar attorney's fees provision in Title VI, construed by this Court in *Cannon*, led to the conclusion that

"[t]he language of this provision explicitly presumes the availability of private suits to enforce Title VI. . . ." 441 U.S. at 699.

Furthermore, in *Cannon*, the Court found persuasive evidence of legislative intent to provide a private remedy in ". . . that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action . . . ." 441 U.S. at 703. Similarly, when Congress patterned Section 504 after Title VI in 1973, it was aware of court decisions finding a private right of action under Title VI.[10]

Third, the implication of a private right of action under Section 504 is consistent with the underlying purposes of the legislative scheme. *See Cort*, 422 U.S. at 78. As with Title IX, the language and legislative history of Section 504 reveal that Congress sought to accomplish two purposes through its enactment: to avoid the use of federal resources to support the discriminatory practices forbidden by Section 504, and to provide individuals an effective remedy against those practices. As with Title IX, the first purpose is served by the administrative enforcement procedures established under Section 504 for termination of federal financial assistance to entities engaged in discriminatory practices outlawed by Section 504. But the administrative enforcement mechanism under Section 504 is identical to that used to enforce Title IX;[11] it suffers from the same deficiencies that led this

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[10] Senate floor debate in 1978 on Section 505(a)(2)—which applied Title VI rights and remedies to Section 504—reveals that Congress was keenly aware of judicial precedent on the private right of action issue. *See* 124 Cong. Rec. 30349 (remarks of Senators Bayh and Cranston).

[11] The regulations HEW adopted to implement Section 504 incorporate the Title VI enforcement procedures. *See* 45 C.F.R. § 84.61 (1979).

Court to find a private remedy complementary to and not destructive of that administrative enforcement mechanism under that statute.

As this Court noted in *Cannon*, 441 U.S. at 704, the remedy of terminating federal financial assistance—the only sanction available under the administrative enforcement scheme—is a draconian and ineffective means of remedying individual instances of discrimination. An agency found to have discriminated will be cut off from funding, but the individual victim of discrimination will not benefit at all. Indeed, the individual complainant is not even granted a role in the agency investigation and enforcement proceedings. A private remedy which focuses on the aggrieved individual and permits a court to provide individually tailored relief is therefore a far more appropriate and effective remedy. In the context of other civil rights statutes, this Court has recognized that suits by persons acting as "private attorneys general" are an invaluable supplement to administrative enforcement. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 556 (1969); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968). In view of the large numbers of federally funded programs covered by Section 504, ". . . the Act's laudable goal could be severely hampered . . . if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General." *Allen*, 393 U.S. at 556. Recognition of both private and public enforcement mechanisms will thus enhance the realization of Congress' objectives in enacting Section 504.

Fourth, the cause of action is not one traditionally relegated to state law and in an area basically of concern to the state. *See Cort*, 422 U.S. at 78. The statute prohibits discrimination and applies to recipients of *Federal* funds. *See Cannon*, 441 U.S. at 708-09.

Whether *Cannon* and *Guardians Association* be viewed as dispositive or the factors in *Cort* be independently analyzed, Section 504 clearly creates a private right of action.[12]

CONCLUSION

For the foregoing reasons, we request this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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[12] This amici curiae brief does not discuss the merits of petitioner's claims regarding compensatory relief under Section 504 and the program-specific nature of the statute. As stated in the Summary of Argument, *supra*, p. 5, these issues were neither raised nor considered in the courts below, and therefore are not properly before this Court.

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No. 82-862

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* SENATORS ALAN CRANSTON, ROBERT J. DOLE, ORRIN HATCH, EDWARD M. KENNEDY, CLAIBORNE PELL, ROBERT T. STAFFORD, LOWELL P. WEICKER, JR., AND REPRESENTATIVES MARIO BIAGGI, DON EDWARDS, WILLIAM D. FORD, JAMES M. JEFFORDS, GEORGE MILLER, AUSTIN J. MURPHY, AND PAT WILLIAMS IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-862

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF *AMICI CURIAE* SENATORS ALAN CRANSTON, ROBERT J. DOLE, ORRIN HATCH, EDWARD M. KENNEDY, CLAIBORNE PELL, ROBERT T. STAFFORD, LOWELL P. WEICKER, JR., AND REPRESENTATIVES MARIO BIAGGI, DON EDWARDS, WILLIAM D. FORD, JAMES M. JEFFORDS, GEORGE MILLER, AUSTIN J. MURPHY, AND PAT WILLIAMS IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

This brief is submitted on behalf of current Members of the United States Congress. As Members of Congress, *Amici* have a compelling interest in the proper construction of statutes, and leave to file is frequently granted congressional *Amici*, particularly where, as here, legislative history must be examined extensively. *E.g.*, *Myers v. United States*, 272 U.S. 52 (1926). Because Congress'

intention in enacting the Rehabilitation Act of 1973 and subsequent amendments thereto was to preclude all discrimination against handicapped persons by recipients of federal financial assistance, *Amici* submit the following brief in support of respondent.[1]

SUMMARY OF ARGUMENT

Conrail contends that in enacting the 1978 Amendments to the Rehabilitation Act of 1973, Congress intended to curtail the right of the handicapped to be free from employment discrimination by recipients of federal funding. The court below properly rejected this assertion. Analysis of the terms, purpose, and legislative history of the Amendments discloses Congress' intent to broaden the Act's prohibition of discrimination. No evidence exists to support Conrail's contrary position.

Considered in view of its stated objectives, the Rehabilitation Act and its Amendments form a coherent whole only if the Act prohibits employment discrimination by all Federal grantees. As this Court noted in *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979), there is a national policy "to avoid the use of Federal resources to support discriminatory practices." With respect to handicapped persons, this policy is embodied in the Rehabilitation Act, as amended. The construction of the Rehabilitation Act urged by Conrail would contravene this national policy and frustrate congressional efforts to rehabilitate handicapped individuals.

Although the issue was not raised in the court below, Conrail also contends that a handicapped victim of discrimination may not vindicate his or her rights through a private cause of action. This assertion is contrary to the overwhelming consensus of the lower federal courts. Congress' intent to establish a private right of action

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[1] The parties' letters of consent are being lodged with the Clerk pursuant to Rule 36.1.

under § 504 is clearly established by reference to the relevant factors outlined by this Court in *Cort v. Ash*, 422 U.S. 66 (1975).

Once an implied right of action is recognized, the full panoply of traditional remedies, including monetary relief, is available unless Congress has clearly evinced its intent to provide only a partial remedy. There is no evidence of a congressional intent to limit remedies to injunctive relief. Indeed, monetary relief is often, as in this case, the only effective means of vindicating the individual rights afforded by § 504. Accordingly, there is no basis for denying an appropriate remedy, including monetary relief, to a handicapped victim of illegal discrimination.

ARGUMENT

I. LEGISLATIVE HISTORY ESTABLISHES CONGRESS' INTENT THAT EMPLOYMENT DISCRIMINATION BE PROSCRIBED BY SECTION 504 OF THE REHABILITATION ACT OF 1973.

Conrail acknowledges that "Congress enacted Section 504 as a broadly worded prohibition of discrimination on the basis of handicap by recipients of Federal financial assistance." Pet. Br. at 14. Nevertheless, Conrail contends that the Rehabilitation Act forbids an employment discrimination action against a Federal grantee except where the purpose of the Federal financial assistance is to provide employment. There is no basis for this contention.

The language of the Act is plain. In pertinent part, § 504 provides:

> *No* otherwise qualified handicapped *individual* . . ., *shall*, solely by reason of his handicap, . . . *be subjected to discrimination under any program or activity receiving Federal financial assistance*. . . .

29 U.S.C. § 794 (emphasis added). Employment discrimination is neither expressly nor impliedly excluded

from the broad coverage of the Act. *LeStrange v. Consolidated Rail Corp.*, 687 F.2d 767, 769-70 (3d Cir. 1982), *cert. granted*, 103 S.Ct. 1181 (1983). Nor does the Act limit the prohibition of discrimination to circumstances where federal financial assistance is related to employment. On the contrary, § 504, on its face, applies to "*any* program or activity receiving Federal financial assistance" (emphasis added). *See Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1379 (11th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3535 (U.S. Jan. 11, 1983) (No. 82-1159).

Since employment is not expressly excluded, the Act must be interpreted to cover such discrimination "unless other considerations counsel to the contrary." *North Haven Board of Education v. Bell*, 456 U.S. 512, 521 (1982). In search of "other considerations," it is proper to turn to the legislative history of the Act for "evidence as to whether Congress intended to limit [its] expansive language." *Id.* at 522. A review of that legislative history discloses no such evidence.

Initial guidance as to the meaning of § 504 is provided by the Act's stated purpose: "to promote and expand *employment* opportunities . . . for handicapped individuals. . . ." 87 Stat. 357, 29 U.S.C. § 701(8) (emphasis added). The interdependent themes of expanding employment opportunities and of prohibiting employment discrimination are repeated in the congressional reports and floor debates. For example, Senator Williams, a sponsor of the Act and chairman of the committee that reported the bill, stated that the legislation included: "prohibitions against discrimination in employment in programs assisted with Federal funds." 119 Cong. Rec. 24,588 (1973). Senator Javits, also a sponsor and the ranking minority member of the same committee, similarly emphasized the Act's provision for "opportunities for employment of the handicapped." 119 Cong. Rec. 5887 (1973). Senator Cranston noted that the Act would ad-

dress "unfounded discrimination in employment." 119 Cong. Rec. 5882 (1973). Senator Taft emphasized the need for strong antidiscrimination provisions: "*Too many handicapped Americans . . . lack jobs . . .* we must devote more of our energy toward the elimination of the most disgraceful barrier of all—*discrimination.*" 119 Cong. Rec. 24,587 (1973) (emphasis added). Significantly, no member of Congress spoke of any limitations upon the Act's prohibition of employment discrimination.[2]

Nor were these statements at variance with Congress' purpose, since the Rehabilitation Act is in large measure directed at employment discrimination. Before considering the Act the Senate Labor Committee held extensive hearings on the need for vocational rehabilitation of handicapped persons. Witnesses repeatedly testified that employment discrimination was rendering ineffective many vocational rehabilitation efforts. In summarizing the testimony, the Senate Committee report spoke of the need to address "the lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, *e.g., employment discrimination . . . .*" S. Rep. No. 318, 93d Cong., 1st Sess. 3, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2078 (emphasis added). Congress' response to this need was the enactment of § 504.

Section 504 must be interpreted in the light of the structure and objectives of the Rehabilitation Act as a

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[2] Conrail attempts to dismiss the statements of Senators Cranston and Javits as mere "expressions of the overall purposes of the Act." Pet. Br. at 16 n.13. This Court has noted, however, that "remarks, as those of the cosponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven*, 456 U.S. at 526-27; *see FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (such a statement "deserves to be accorded substantial weight in interpreting the statute."). Moreover, Conrail cites no references to congressional debates supporting its assertion that Congress intended to limit the Act's application to employment discrimination.

whole, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), so as to be in harmony with the larger purpose of the enactment of which it forms a part. *North Haven*, 456 U.S. at 521-22; *TVA v. Hill*, 437 U.S. 153, 188 (1978). Because Conrail's interpretation of § 504 is inconsistent with the Act's structure and objectives, which are aimed largely at employment discrimination, that interpretation must be rejected. *See National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

In view of the congressional purpose to promote employment opportunities for the handicapped, and having cited employment discrimination as a major problem, it would be incomprehensible for Congress to have excluded from the Act a prohibition of employment discrimination. Without such a provision, all other congressional efforts to expand employment opportunities might be thwarted. A contrary conclusion would "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490, 513 (1981) (citations omitted).[3]

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[3] *See Bob Jones Univ. v. United States*, 103 S. Ct. 2017, 2025-26 (1983).

> The general words used in the clause, . . . taken by themselves and literally construed without regard to the object in view would seem to sanction the claim of the plaintiff. But this mode of expounding the statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the legislature intended to accomplish. And it is well settled that in interpeting the statute, the court will not look merely to a particular clause in which general words may be used, *but will take in connection with it the whole statute . . . and the objects and policy of the law. . . .*

Id., quoting Brown v. Duchesne, 60 U.S. (19 How.) 183, 194 (1857) (emphasis by the court). *See also New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 419-420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

Congressional action and statements after enactment of § 504 also confirm that it prohibits employment discrimination. In 1974, the Rehabilitation Act was amended to clarify the fact that employment discrimination was not the *only* form of prohibited discrimination.[4] The Senate committee report on the 1974 Amendment states:

> It was clearly the intent of Congress in adopting . . . Section 504 (nondiscrimination) that *the term "handicapped individual" in [that] section was not to be narrowly limited to employment (in the case of Section 504).*[5]

Because this amendment was enacted to clarify the 1973 Act, it should "be accorded great weight when interpreting Congressional intent." *NAACP v. Medical Center, Inc.*, 599 F.2d 1247, 1258 n.48 (3d Cir. 1979), *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380 (1969).

Similarly, during consideration of related legislation, references to the Rehabilitation Act made clear Congress' view that it prohibited employment discrimination.[6]

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[4] *See* Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1618, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373. Section 8(6) of the 1973 Act defined "handicapped individual" as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial *handicap to employment* and (B) can reasonably be expected to *benefit in terms of employability* from vocational rehabilitation services provided pursuant to Titles I and III of this Act" (emphasis added). In 1974, the definition was broadened to include any person suffering an "impairment . . . [of] major life activities." 29 U.S.C. 706(6).

[5] S. Rep. No. 1297, 93d Cong. 2d Sess. 37, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6388 (emphasis added).

[6] The conference report on the Education For All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1461, stated:

> It is clear that *qualified handicapped individuals*, who, because of their handicaps are *refused employment* by recipients of

Not a shred of legislative history contemporaneous with the enactment of the Rehabilitation Act or the 1974 Amendments supports the proposition that the Act does not prohibit employment discrimination. To the contrary, § 504's prohibition of employment discrimination is properly viewed as a congressional effort to guarantee the effectiveness of the vocational rehabilitation programs established during the same period.

II. THE 1978 AMENDMENTS TO THE REHABILITATION ACT DO NOT LIMIT THE REACH OF SECTION 504.

In 1978, Congress amended the Rehabilitation Act again.[7] Conrail finds in § 505(a)(2), which was added by the 1978 Amendments, a congressional intent to limit the reach of the Act. That provision states:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964, shall be

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assistance under the Act *are fully covered by the prohibition in section 504 of the Rehabilitation Act of 1973.*

S. Rep. No. 455, 94th Cong., 1st Sess. 53, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1480, 1504.

In like fashion, a proposed section of the Education Amendments of 1974 forbidding discrimination against physically handicapped teachers attempting to secure employment in federally funded programs was dropped "because section 504 of the Rehabilitation Act of 1973, which is now in effect, prohibits such discrimination." S. Rep. No. 1026, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4206, 4250.

While these references are to different legislation than that at issue here, subsequently enacted statutes declaring the intent of an earlier statute are entitled to great weight in statutory construction. *Glidden Co. v. Zdanok*, 370 U.S. 530, 541 (1962); *FHA v. The Darlington*, 358 U.S. 84, 90 (1958). Significantly, there is no suggestion in the legislative history of either Act that § 504's prohibition of employment discrimination is affected in any way by the purpose of the federal funding.

[7] Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, 92 Stat. 2955, *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312.

> available to any person aggrieved by an act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under Section 794 of this title.

29 U.S.C. § 794a. Section 604 of Title VI includes the following limitation:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3.

Conrail contends that this limitation is incorporated in the Rehabilitation Act by § 505(a)(2).[8] The court below properly rejected this contention. The language of § 505(a)(2) does not compel this result, and the legislative history of the 1978 Amendments will not permit it.

A. Congress Intended to Expand the Reach of Section 504 by Enacting the 1978 Amendments.

If, as Conrail contends, Congress intended in 1978 to limit the reach of the Rehabilitation Act, it is extraordinary that the Amendments' legislative history contains no evidence of such a purpose. Implied repeals are not favored. *E.g.*, *Morton v. Mancari*, 417 U.S. 535, 549 (1974). Had Congress intended to limit the reach of

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[8] The position urged by Conrail was adopted by the Fourth Circuit Court of Appeals in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979). The *Trageser* holding was embraced without further analysis by the Eighth Circuit in *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir. 1980); the Second Circuit in *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); and the Ninth Circuit in *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982). The *Trageser* analysis was rejected by the court below and by the Eleventh Circuit in *Jones v. Metropolitan Atlanta Rapid Transit Auth.*, 681 F.2d 1376 (11th Cir. 1982).

§ 504's employment coverage, it would have done so clearly.[9]

Contrary to Conrail's assertion, "[t]he overwhelming impression created by the legislative history of the 1978 Amendments is that Congress intended to *expand* the remedies available under the Act." *Hart v. County of Alameda*, 485 F. Supp. 66, 72 (N.D. Cal 1979) (emphasis in original). Both the committee report[10] accompanying the Amendments and the floor debates[11] concerning them disclose a congressional purpose to expand the Act, to which no objection was raised. Neither source contains a hint of any intent to limit the Act's application to employment discrimination.

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[9] *See Hart v. County of Alameda*, 485 F. Supp. 66, 72 (N.D. Cal. 1979) ("[I]n light of the great emphasis which the Act places upon securing employment opportunities for handicapped individuals, it is remarkable to attribute to Congress a desire to get this protection by such a deft, unheralded maneuver.")

[10] The report describes the enactment of § 505 as designed to "*enhance* the ability of handicapped individuals to assure compliance with the civil rights provisions of Title V." S. Rep. No. 890, 95th Cong., 2d Sess 18 (1978) (emphasis added). The reconciliation of House and Senate versions of the Amendments is reported in House Conf. Rep. No. 1780, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 7312. Because the conference report notes only that the House receded in its opposition to § 505(a)(2), the "controlling" legislative history is found in the Senate report.

[11] For example, Senator Stafford noted that the 1978 Amendments would "allow the rehabilitation program to *grow* and serve *more* handicapped individuals." 124 Cong. Rec. 30,311. Senator Cranston, who was the author of § 505, pointed out that after amendment of the Act, "[f]ederal contractors and grantees would—appropriately—continue to be required to be equal opportunity employers." 124 Cong. Rec. 30,578. Congressman Jeffords, in discussing the elimination by the Amendments of an exemption for the Federal government, described the Amendments as "going a long way toward developing a uniform and equitable national policy for elimination of discrimination." 124 Cong. Rec. 13,901 (1978). No member of Congress rose in opposition to any of these statements.

The enactment of § 505—a provision described as "designed to enhance . . . compliance with the civil rights provisions of Title V," *see* note 10 *supra*—cannot logically be interpreted to limit existing remedies. Particularly in view of the remedial purpose of § 504, any amendment thereto "should be broadly applied and liberally construed" in the absence of a compelling indication of contrary congressional intent. *S-1 v. Turlington*, 635 F.2d 342, 347 (5th Cir.), *cert. denied*, 454 U.S. 1030 (1981).

B. Congress Expressly Stated Its Intent to Codify Existing Agency Practice Which Provided a Broad Scope for Section 504.

Prior to the enactment of the 1978 Amendments, HEW promulgated regulations implementing § 504, 45 C.F.R. 84.11-.14 (1977), which broadly prohibited discrimination in employment by Federal grantees *without regard to the purpose of the financial assistance received.* HEW submitted the regulations to Congress on April 28, 1977.[12]

Congress considered the regulations in the course of oversight hearings on § 504,[13] and the Senate committee report on the 1978 Amendments discusses them. The Report then states: "This amendment codifies existing practice as a specific statutory requirement." S. Rep. 95-890 at 19.

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[12] In a press release announcing promulgation of the regulations, the HEW Secretary described the regulation as "the basis for other similar regulations that will be used by all other federal departments and agencies and that *will affect all recipients of federal funds.*" HEW News, April 29, 1977 (emphasis added).

[13] *Implementation of Section 504 of the Rehabilitation Act of 1973: Hearings before the Subcommittee on Select Education of the House Committee on Education and Labor*, 95th Cong., 1st Sess. (1977). *See* Testimony of David S. Tatel, Director, Office for Civil Rights, Department of Health, Education, and Welfare at 294 ("With regard to employment practices, the regulations require nondiscriminatory recruitment, hiring, compensation, job assignment and classification, and fringe benefits.").

Even were Congress unaware of HEW's interpretation of § 504, that interpretation would be entitled to substantial judicial deference. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153 (1946). The construction of a statute by an agency charged with its administration must be followed unless there are compelling indications that the agency's interpretation is either "plainly erroneous" or "demonstrably irrational." *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66 (1980); *Dublino*, 413 U.S. at 421. Here, judicial deference is even more appropriate because Congress knew of the agency interpretation, cited it when amending the statute, and expressly adopted the agency's interpretation.

> Where 'an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation, although it has amended the statute in other respects, presumably the legislative intent has been correctly discerned."

North Haven, 456 U.S. at 535, *quoting United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979).[14]

Conrail suggests that Congress "overlooked" the differences between HEW's § 504 and Title VI regulations, implying that Congress was unaware of the scope of the HEW regulations it expressly approved. Pet. Br. at 21.

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[14] *See also Lorillard Division of Loew's Theaters, Inc. v. Pons*, 434 U.S. 575, 580-81 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380-82. "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, *especially when Congress has refused to alter the administrative construction.*" *CBS, Inc. v. FCC*, 453 U.S. 367, 382 (1981) (emphasis added); *Haig v. Agee*, 453 U.S. 280, 291 (1981); *Miller v. Youakim*, 440 U.S. 125, 144-145 (1979); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).

However, Representative Dodd specifically called attention to the HEW regulations during debate on the 1978 Amendments.[15] Moreover, when HEW promulgated the § 504 regulations, it pointed out that § 504 differed from Title VI "in the extent to which it applies to employment practices." 42 Fed. Reg. 22,676 (1977). As the court below noted, no member of Congress "suggested HEW had gone too far." *LeStrange*, 687 F.2d at 774. Nor does the committee report citing these regulations contain anything to indicate a belief that HEW had exceeded its authority.[16]

In sum, the legislative history of the 1978 Amendments shows Congress' approval of the prevailing interpretation of § 504, thus confirming Congress' intent that the 1978 Amendments not limit the scope of § 504's prohibition of discrimination.

C. Congress Acquiesced in Agency Practice Subsequent to the 1978 Amendments Which Provided A Broad Scope for Section 504.

More than twenty federal agencies have promulgated regulations implementing § 504 since the 1978 Amend-

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[15] Representative Dodd "strongly supported" issuance of the regulations and stated that "the protections [these regulations] established for the handicapped are very much needed." 124 Cong. Rec. 13,905 (1978).

[16] Congress was presumably also aware of judicial decisions which, like the regulations, interpreted § 504 to prohibit all handicap employment discrimination by federal grantees. Prior to the 1978 Amendments, all the federal courts considering whether § 504 prohibits employment discrimination held it to do so without reviewing the purpose of the federal funding. *See Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978); *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla. 1977); *Drennon v. Philadelphia Gen. Hosp.*, 428 F. Supp. 809 (E.D. Pa. 1977); *Gurmankin v. Costanzo*, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd on other grounds*, 556 F.2d 184 (3d Cir. 1977).

ments.[17] *In every case*, these regulations prohibit employment discrimination by all recipients of Federal funding, without reference to the purpose of the funding. Similarly, after enactment of the 1978 Amendments, more federal courts joined the ranks of those holding that § 504 prohibits discrimination regardless of the primary objective of the federal assistance.[18] Congress, however, took no steps to alter the interpretations of any of these agencies or courts.

It was only after the decision of the Fourth Circuit in *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979), that objection was voiced in Congress to an interpretation of § 504. The Senate committee responsible for reporting

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[17] *See* 45 C.F.R. 1232.9-.12 (ACTION); 34 C.F.R. 104.11-.14 (Dept. of Education); 45 Fed. Reg. 40514 (1980), to be codified at 10 C.F.R. 1040.66-.69 (Dept. of Energy); 45 Fed. Reg. 66,706 (1980), to be codified at 29 C.F.R. 32.12-.17 (Dept. of Labor); 45 Fed. Reg. 37,620 (1980), to be codified at 28 C.F.R. 42.510-.513. (Dept. of Justice/LEAA); 45 C.F.R. 1624.6 (Legal Services Corporation); 45 C.F.R. 1151.31-.34 (National Endowment for the Arts), 14 C.F.R. 1251.200-.203 (NASA); 45 Fed. Reg. 14,533 (1980), to be codified at 10 C.F.R. 113.3(c) (Small Business Administration); 45 Fed. Reg. 69,437 (1980), to be codified at 22 C.F.R. 142.11-.14 (State Department); 45 Fed. Reg. 22,893 (1980), to be codified at 18 C.F.R. 1307.5 (TVA); 45 Fed. Reg. 63,264 (1980), to be codified at 38 C.F.R. 18.411-.414 (Veterans' Administration); 43 Fed. Reg. 16,652 (1978) (Dept. of Housing and Urban Development); 43 Fed. Reg. 15,737 (1978) (National Endowment for the Humanities); 45 Fed. Reg. 24,074 (1980) (Dept. of Interior); 44 Fed. Reg. 77,356 (1979) (Office of Revenue Sharing); 44 Fed. Reg. 68482 (1979) (EEOC); 47 Fed. Reg. 25,463-64 (June 11, 1982) (Dept. of Agriculture); 47 Fed. Reg. 25,337 (June 11, 1982) (General Services Administration); 47 Fed. Reg. 15,112-27 (April 6, 1982) (Dept. of Defense); 47 Fed. Reg. 8570-73 (March 1, 1982) (National Science Foundation); 46 Fed. Reg. 55,894-90 (November 12, 1981) (National Foundation for the Arts and Humanities).

[18] *See LeStrange*, 687 F.2d at 776; *Jones*, 681 F.2d at 1382; *Upshur v. Love*, 474 F. Supp. 332 (N.D. Cal. 1979); *Whitaker v. Bd. of Higher Education*, 461 F. Supp. [illegible] (E.D.N.Y. 1978).

both the Rehabilitation Act and the 1978 Amendments expressed disapproval of *Trageser*. The committee stated:

> [*Trageser*] *is not consistent with Congress' original and continuing intent* that handicapped individuals be empowered to bring suit in Federal District Courts for alleged employment discrimination in violation of [§ 504] regardless of the designated use of the federal funds received by the employer in question.

S. Rep. No. 316, 96th Cong., 1st Sess. 1213 (1979) (emphasis added).[19]

Congress' acquiescence in the agencies' unanimous interpretation that § 504 prohibits *all* employment discrimination by recipients of federal funds, coupled with Congress' speedy disapproval of the *Trageser* court's contrary interpretation, confirms Congress' intent that the prohibition of employment discrimination not be linked to the purpose of federal funding. *See Commissioner v. Estate of Noel*, 380 U.S. 678, 681-82 (1965); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

D. Even If Section 505(a)(2) Incorporated Into The Rehabilitation Act the Title VI Limitations Embodied in Section 604, the Plain Language of Section 604 Precludes Its Application To This Case.

By its terms § 604 of Title VI applies only to action "by any department or agency." Conrail asserts, however, without citation of case authority or legislative his-

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[19] Conrail asserts that the Committee's disavowal of *Trageser* should be accorded little weight, contending that a statement in a report declaring the intent of a prior statute is "less weighty" than subsequent legislation declaring the intent of an earlier statute. Pet. Br. at 22-23. In this case, however, there is no subsequent legislation declaring the intent of an earlier statute to which the Court may look for guidance. Moreover, even if a statement contained in a report is less weighty than a statute, it is certainly *more* weighty than an assertion by Conrail unsupported by *any* citation to legislative history. *Cf. Southeastern Community College v. Davis*, 442 U.S. 397, 411 n.11 (1979).

tory, that § 604 limits private enforcement as well as government enforcement of § 504. Reading *Community Television of Southern California v. Gottfried*, 51 U.S.L.W. 4134 (U.S. Feb. 22, 1983) (No. 81-298), grossly out of context, Conrail asserts that Congress did not intend to vest individuals with substantive rights broader than those subject to agency enforcement. Pet. Br. at 10. In fact, *Community Television* considered only the issue of which agency among those with overlapping jurisdiction had the primary responsibility for enforcing § 504. *Community Television* in no way supports the proposition that § 604's limitation on agency or department actions also limits private actions.

Thus, even assuming *arguendo* that § 604 could be relevant to actions under the Rehabilitation Act, § 604 limits only agency action. This Court should not lightly impute to Congress the intent to limit a right which it has conferred, particularly in the face of express congressional disapproval of prior judicial declarations to that effect.

III. CONTRARY TO CONRAIL'S ASSERTION, THERE IS A PRIVATE RIGHT OF ACTION TO ENFORCE SECTION 504, IN WHICH THE COURT MAY DRAW UPON THE FULL PANOPLY OF TRADITIONAL REMEDIES, INCLUDING MONETARY RELIEF.

Conrail also contends that there is no private right of action under § 504, and that, if a cause of action does exist, monetary relief may not be awarded. Neither of these theories was presented to the court below. Both are meritless.

A. The Congressional Intent Manifested in the Statutory Language and Legislative History Establishes a Private Right of Action To Remedy Violations of Section 504.

Congress' intent to create a private cause of action to enforce § 504 has long been recognized by the federal courts. All the Courts of Appeals that have addressed

the question, now totaling eight, have held that there is an implied private cause of action.[20] District courts in the remaining circuits have also so held.[21] In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court held that a private cause of action is implicit in Title IX, on which § 504 was modeled, and whose language and legislative history are equivalent to those of § 504 in virtually every relevant respect. Since *Cannon*, seven Justices have also recognized an implied right of action under Title VI, the other model for § 504.[22] Application of the *Cannon* analysis demonstrates that there is also a private right of action under § 504.

Congressional intent determines whether a statutory section defining private duties creates an implied private right of action. *E.g.*, *Cannon*, 441 U.S. at 688. Congress' intent to provide a private remedy is suggested by § 505(b) of the Rehabilitation Act, which provides:

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[20] *Miener v. State*, 673 F.2d 969 (8th Cir.), *cert. denied*, 103 S. Ct. 215 (1982); *Pushkin v. Regents of the University of Colorado*, 659 F.2d 1372 (10th Cir. 1981); *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980); *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980), *vacated on other grounds*, 451 U.S. 390 (1981); *NAACP v. Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis v. Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Kampmeier v. Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977).

[21] *Garrity v. Gallen*, 522 F. Supp. 171 (D.N.H. 1981); *Fells v. Brooks*, 522 F. Supp. 30 (D.D.C. 1981); *Cruz v. Collazo*, 84 F.R.D. 307 (D. Puerto Rico 1979); *Michigan Paralyzed Veterans v. Coleman*, 451 F. Supp. 7 (E.D. Mich. 1977).

[22] *Guardians Assoc. v. Civil Serv. Comm'n*, 51 U.S.L.W. 5105 (U.S. July 1, 1983) (No. 81-431) at 5110-12 (White, J., announcing judgment, joined by Rehnquist, J.); at 5113 (O'Connor, J., concurring in the judgment); at 5114-20 (Marshall, J., dissenting), at 5120-23 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.).

> In *any action or proceeding* to enforce or charge a violation of a provision of this subchapter, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. § 794a(b) (emphasis added) (1981 Supp. V).

On their face, the words "action or proceeding to enforce or charge a violation" encompass private enforcement. Moreover, this attorneys' fee provision is only meaningful in the context of a private cause of action.

Application of the *Cannon* analysis amply demonstrates that Congress' intent accords with that apparent meaning. In *Cannon* the Court examined four factors first outlined in *Cort v. Ash*, 422 U.S. 66 (1975). The first inquiry is whether the plaintiff is " 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff?" *Id.* at 78. The second inquiry looks to the legislative history for "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Id.* The third asks "Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy . . .?" *Id.* The final question is whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States . . .?" *Id.*

All of the four factors favor a private right of action. First, by its terms, § 504 protects "otherwise qualified handicapped individual[s]." This language "expressly identifies the class Congress intended to benefit." *See Cannon*, 441 U.S. at 690. The wording is substantially identical to that of Title IX—language which this Court has described as having "an unmistakable focus on the benefited class." *Id.* at 691. "Unquestionably, therefore, the first of the four factors identified in *Cort* favors the implication of a private cause of action." *Id.* at 693-94.

The second *Cort* factor calls for an examination of the legislative history.[23] "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of Section 601 of the Civil Rights Act of 1964 [Title VI], ... and Section 901 of the Education Amendments of 1972 [Title IX] . . . ." S. Rep. No. 93-1297 at 4. By the time the Rehabilitation Act was enacted in 1973, it was widely recognized that the same language sufficed to create a private right of action when used in Title VI. This Court has noted that the issue had been "squarely decided" in 1967, "in an opinion that was repeatedly cited with approval and never questioned during the ensuing five years." *Cannon*, 441 U.S. at 696. Because § 504, like Title IX, was patterned on Title VI and enacted in light of its history of judicial interpretation, the conclusion reached in *Cannon* applies to § 504 with equal force: "[W]e are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent. . . ." 441 U.S. at 697-98.[24]

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[23] "We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon*, 441 U.S. at 694, *quoting Cort*, 422 U.S. at 82. Accordingly, where, as here, the first *Cort* factor is satisfied, "it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such a cause of action would be controlling." *Id.* (emphasis in original).

[24] This conclusion is further buttressed by the interpretation given other statutes during the years immediately preceding enactment of § 504. This Court interpreted the "comparable language," *see Cannon*, 441 U.S. at 698, of § 5 of the Voting Rights Act to establish a private remedy. *Allen v. State Board of Elections*, 393 U.S. 544 (1969). During the period preceding enactment of § 504, this Court consistently found implied private remedies in other contexts. *See Superintendent of Insurance v. Bankers Life and Casualty Co. of New York*, 404 U.S. 6 (1971); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Wyandotte Transportation Co. v. United*

If the language is to be interpreted to have some contrary meaning, there must be clear evidence that Congress so intended. No such evidence is to be found.

The same Congress that enacted § 504 added clarifying amendments in its second session. *See* Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617. The Senate Report explicitly referred to the original and continuing intent to authorize private enforcement:

> The language of Section 504, in following [Title VI and Title IX], further envisions the implementation of a compliance program which is similar to those Acts. . . This approach to implementation of Section 504, which closely follows the models of the above-cited anti-discrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal Government as well as relative ease of implementation, *and* permit *a judicial remedy through a private action.*

S. Rep. No. 93-1297, at 39-40 (emphasis added). Congress made it abundantly clear that a private cause of action is afforded *in addition to* judicial review by separately listing the two types of proceedings.

The legislative history of the 1978 Amendments furnishes further evidence of Congress' intent to permit a private right of action. The Senate Report states:

> The committee believes that the rights extended to handicapped individuals under [*inter alia*, § 504] . . . are and will remain, in need of constant vigilance by handicapped individuals to assure compliance,

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States, 389 U.S. 191 (1967); *J. I. Case Company v. Borak*, 377 U.S. 426 (1964). *Cort*, which marked a somewhat stricter approach to the implication of private rights of action, was not decided until two years after enactment of § 504. The fact that the ultimate issue is congressional intent requires that a court take a more lenient view toward the implication of private rights of action in statutes that predate the more recent trend. *See Cannon*, 441 U.S. at 698-99.

> and the availability of attorney's fees should assist in vindicating *private rights of action* in cases . . . arising under Section 504.[25]

The third *Cort* factor provides that a private right of action will not be implied where it would frustrate the congressional purpose. "On the other hand, when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Cannon*, 441 U.S. at 703.

Section 504 extends to the handicapped the two objectives embodied in its forerunners, Titles VI and IX: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704.[26] The statutory fund cutoff procedure will

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[25] S. Rep. No. 95-890, at 19 (emphasis added). Senator Cranston, a key proponent, reiterated the point before the full Senate. "To date, we have permitted certain private enforcement of [the title including § 504] and, yet, we have not provided the means by which such private rights of action are meaningful." 124 Cong. Rec. 30,346 (1978). In 1979 the Senate Committee on Labor and Human Resources stated its concurrence in the general understanding that there is and should be a private right of action. S. Rep. No. 96-316 at 12-13. *See* p. 25, *infra*. Such statements went completely unchallenged.

[26] Conrail's denial of the latter purpose cannot be supported. As already discussed, the statute is phrased in terms of individual rights and evinces an intent to benefit members of a particular class. The legislative history also explicitly indicates that the section is intended to provide for vindication of *individual* rights. *See, e.g.*, S. Rep. No. 95-890, at 19 ("[T]he rights extended to handicapped *individuals* . . . are, and will remain, in need of constant vigilance by handicapped *individuals* to assure compliance, and the availability of attorney's fees should assist in vindicating private rights of action. . . .") (emphasis added); 124 Cong. Rec. 30,346 (1978) (comments of Sen. Cranston) ("This amendment . . . will go a long way toward assisting long-neglected Americans—handicapped *individuals*—in their efforts to achieve their full and equal share of the rights to which they're entitled.") (emphasis added).

rarely, if ever, be effective in promoting the second purpose. *See id.* at 704-706. Funding termination is often considered by the funding agency to be too draconian a remedy in cases of isolated violations.[27] Yet Congress wanted to protect the handicapped from *all* illegal discrimination, including isolated instances. "In that situation, the violation might be remedied more efficiently by an order requiring an institution to accept an applicant who had been improperly excluded." *Id.* at 705. As this Court stated with respect to Title IX,

> . . . in that kind of situation it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on [the agency enforcing the statute], the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.

441 U.S. at 705-06. The same reasoning applies to § 504.

Even when the government is willing to cut off funding, that would not achieve the purpose of vindicating a particular victim's rights. Prevention or deterrence of future violations does nothing to remedy his or her losses.[28] Moreover, even if effective remedies were available through the administrative process, they could not

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[27] *See, e.g., Lamber, Private Causes of Action Under Federal Agency Nondiscrimination Statutes,* 10 Conn. L. Rev. 859, 888 & n.150 (1978) (due to the "extreme and harsh" nature of the sanction, HEW cut off funding for only three educational institutions in 14 years).

[28] The inadequacy of funding termination is particularly poignant in cases such as the present one, where prospective relief provides no benefit at all to the family of the victim, who is now deceased.

reach every instance of prohibited conduct.[29] In sum, as in the case of Title IX, the proposition that "the individual remedy will provide effective assistance to achieving the statutory purposes" is "unquestionably correct." *Cannon*, 441 U.S. at 707-08.

The final *Cort* factor counsels hesitance in implying a private right of action where the subject matter involves an area basically of concern to the states. *Cannon*, 441 U.S. at 708. However, "[n]o such problem is raised by a prohibition against invidious discrimination of any sort. . . . Since the Civil War, the Federal Government and the federal courts have been the '*primary* and powerful reliances' in protecting citizens against such discrimination."[30] As in the case of Title IX, "[t]here can be no question but that this aspect of the *Cort* analysis supports the implication of a private federal remedy." *Id.* at 709.

Because all four of the *Cort* factors point in the same direction, there is no need for balancing, and the proper result is inescapable. *See Cannon*, 441 U.S. at 709. In sum, the uniform conclusion of the lower federal courts that Congress created a private right of action to enforce § 504 is correct.

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[29] When the question of a private cause of action under Title IX came before this Court, HEW candidly admitted that "as a practical matter, HEW cannot hope to police all federally funded education programs. . . ." *Cannon*, 441 U.S. at 708 n.42. The same is unquestionably true in the case of § 504, which applies not only to educational institutions, but to all entities receiving federal financial assistance. In this regard, it should be noted that the United States supports the position that a private right of action under § 504 is appropriate. *See* Brief Amicus Curiae of the United States, filed in this action, at 5-10.

[30] *Cannon*, 441 U.S. at 708, *quoting Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (emphasis in original), *quoting* F. Frankfurter and J. Landis, *The Business of the Supreme Court* 65 (1928). The predominance of the federal interest is yet clearer where, as here, the duties are imposed exclusively on the recipients of federal funds. *See Cannon*, 441 U.S. at 708-09.

B. In the Absence of Clear Evidence That Congress Intended to Limit the Scope of the Judicial Remedy It Provided, a Court May Draw on the Full Panoply of Traditional Remedies, Including Monetary Relief.

Conrail now contends for the first time that, even if a private remedy is available, monetary relief cannot be awarded. That assertion is entirely without merit.

Once a substantive right and a cause of action to enforce it have been recognized, the relief available depends principally on what is effective in alleviating the harm, for "the existence of a right implies all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

> "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use *any available remedy* to make good the wrong done.

Bell v. Hood, 327 U.S. 678, 684 (1945) (footnotes omitted) (emphasis added).

Five Members of this Court have noted that, since the usual practice is to draw upon the full panoply of judicial remedies, the defendant must demonstrate a congressional intent to circumscribe the relief available.[31] *Accord, Patton v. Dumpson*, 498 F. Supp. 933 (S.D.N.Y.

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[31] *Guardians Assoc. v. Civil Serv. Comm.*, 51 U.S.L.W. 5105 (U.S. July 1, 1983), No. 81-431 at 5113 (O'Connor, J., concurring in the judgment), at 5117-20 (Marshall, J., dissenting), at 5120-21 (Stevens, J., dissenting, joined by Brennan & Blackmun, JJ.). Justice O'Connor stated that equitable relief should not be circumscribed under Title VI. *Id.* at 5113. Since this case also involves equitable relief, *see* pp. 27-28 *infra*, it falls within the scope of her opinion. Although Justice O'Connor did not address the availability of damages, we submit that the principle and rationale of *Bell v. Hood* apply equally to such "legal" relief.

1980). Here, the statutory language and legislative history of § 504 are totally devoid of any indication that Congress intended the atypical step of excluding monetary relief. *Hutchings v. Erie City and County Library Board of Directors*, 516 F. Supp. 1265, 1268 (W.D. Pa. 1981).

Indeed, the understanding that monetary relief is available under § 504 was confirmed when a proposal was made to bring the handicapped under the protection of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 295, as amended, which provides for backpay, but not damages at law. The proposal was rejected on the ground that backpay was already available under the Rehabilitation Act. S. Rep. No. 96-316 at 12-13. Accordingly, even if specific evidence of the intent to include retrospective compensatory relief were necessary,[32] that requirement would be satisfied.

The general rule has long been that monetary relief is available to remedy violations of civil rights, including under those statutes that make no specific mention of damages.[33] If Congress had intended to depart from the usual practice it would have made its intention explicit, as it did with respect to other statutory schemes.[34]

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[32] In *Guardians Assoc.*, note 22 *supra*, two Justices took the view that there must be such evidence where the discrimination is unintentional and the implied right of action is created through an exercise of the Spending Power. *Id.* at 5109-11 (White, J., announcing the judgment). However, that case must be distinguished since Conrail cannot deny that LeStrange was intentionally refused employment on the basis of his handicap.

[33] These include suits under 42 U.S.C. § 1981, *Runyon v. McCrary*, 427 U.S. 160 (1976); 42 U.S.C. § 1982, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and 42 U.S.C. § 1983, *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled as to another holding, Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 663 (1978).

[34] For example, under Title VII Congress provided for the award of backpay but not compensatory damages. 42 U.S.C. § 2000e-5(g) (1976).

Accordingly, in the vast majority of decisions recognizing a private right of action under § 504, the courts have not limited their holdings to suits seeking particular types of relief.[35] Among those cases in which the defendant contended that monetary relief was unavailable, the weight of authority, including the sole Court of Appeals decision on the subject, holds that monetary relief is available.[36] On the other side, Conrail cites only one unreversed case holding that the private cause of action is limited to nonmonetary relief.[37]

Conrail's argument against monetary relief relies on *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979). But that case, which arose under the Investment Advisors Act of 1940, 15 U.S.C. § 80b-1 *et seq.*, has no force in the context of § 504.[38]

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[35] These include decisions in which the opinion explicitly states that damages were requested, *see Strathie v. Dept. of Transp.*, 547 F. Supp. 1367, 1370 (E.D. Pa. 1982); *Stubbs v. Kline*, 463 F. Supp. 110, 112 (W.D. Pa. 1978); *Drennon*, 428 F. Supp. at 812, as well as many in which it is unclear whether monetary as well as injunctive relief was sought.

[36] *Miener*, 673 F.2d at 969; *Gelman v. Dept. of Ed.*, 544 F. Supp. 651 (D. Colo. 1982); *Gregg B. v. Bd. of Ed.*, 535 F. Supp. 1333 (E.D.N.Y. 1982); *Hutchings v. Erie City & County Library Bd. of Directors*, 516 F. Supp. 1265 (W.D. Pa. 1981); *Patton v. Dumpson*, 498 F. Supp. 933 (S.D.N.Y. 1980); *Poole v. S. Plainfield Bd. of Ed.*, 490 F. Supp. 948 (D.N.J. 1980). *See also Colin K. v. Schmidt*, 536 F. Supp. 1375 (D.R.I. 1982) (damages are "probably available").

[37] *Carter v. Independent School District No. 6*, 550 F. Supp. 175 (W.D. Okla. 1981). *Carter* simply relies on *Boxall v. Sequoia Union High School District*, 464 F. Supp. 1104 (N.D. Cal. 1979), a case offering only dicta on the subject.

[38] Section 206 of the Investment Advisors Act "simply proscribes certain conduct," *id.* at 19, which contrasts sharply with language conferring rights on a benefited class. Thus, *TAMA* is entirely consistent with *Cort*, *Cannon*, and the analysis in Section III.A, *supra*. Furthermore, *TAMA* provides no basis applicable to § 504 for distinguishing monetary and injunctive relief. Conrail attempts to read into that decision the suggestion that there must be special

Conrail also contends that monetary awards are inconsistent with the statutory purposes. But even if one accepted *arguendo* the remarkable premise that the legislation had no compensatory purpose, that does not mean that damages are inconsistent with other purposes. Civil liability not only is consistent with the purpose of eliminating discrimination, but significantly advances it through deterrence. This deterrence is particularly important in light of the fact that government funding termination is unlikely to occur accept in egregious cases.[39] Finally, Conrail asserts that since the Rehabilitation Act provides for appropriations, its major purpose is funding. However, § 504 is not a funding provision, but rather guarantees rights. The funding termination provision in § 505 makes it clear that eligibility for funding under other parts of the Act was meant to be *conditional* on compliance with § 504. It also demonstrates conclusively that Congress did not consider the imposition of major economic losses on violators to be counter to its purposes.

Conrail's reliance on *TAMA* in opposing monetary relief is grossly misplaced. *TAMA* not only fails to support Conrail's novel monetary/non-monetary distinction; it strongly suggests the availability of backpay. The Court held that § 215 of the Investors Advisors Act, which declares certain contracts void, authorizes an implied equitable remedy of rescission.[40] Restitution—a form of

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evidence of a congressional intent to provide a private suit for *damages* as opposed to a general intent to provide a cause of action, presumably including all forms of relief. There is no basis for that conclusion. Although the Court spoke of "private suits for damages" in connection with § 206 of the Act, this language served simply to distinguish those suits from suits for equitable relief under a different section (§ 215).

[39] *See* notes 27 & 29 *supra*.

[40] Under the usual *Cort* analysis, the case for a private right of action under § 215 was weak, since the statute is phrased in terms

monetary relief—could be ordered as an adjunct to rescission. Restitution complements rescission by requiring the return of any consideration given, thereby returning the parties to the approximate position they would occupy if the voided contract had never been entered. Similarly, backpay is an equitable remedy [41] which complements injunctive relief by giving the victim of employment discrimination the consideration he or she would have received but for the illegal discrimination. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Co.*, 328 U.S. 395, 398 (1946). Accordingly, if an equitable declaratory or injunctive remedy is permitted under § 504, it is appropriate to allow backpay as well.[42]

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of a declaration of a legal conclusion, rather than identifying a benefited class of plaintiffs. Nevertheless, the Court recognized that the declaration would be meaningless unless there were some way that it could be brought before the courts. *TAMA* thus stands for the proposition that, even in some cases where the *Cort* factors do not favor an implied right of action, a limited remedy may nevertheless be necessary to prevent the statute from being totally without effect. Contrary to Conrail's suggestion, the recognition of a special remedy in *TAMA*, even though the first *Cort* factor is not present, does not support a *limitation* on available relief where the usual analysis points clearly toward a private right of action.

[41] Thus, in an implied cause of action under § 17 of the Fair Labor Standards Act of 1938, 52 Stat. 1069, as amended, 29 U.S.C. § 217 (1976), the authority to award backpay derives from the "historic power of equity." *Mitchell v. Robert DeMairio Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

[42] Permitting the award of backpay is especially appropriate since Congress has specifically stated its understanding that backpay is available. S. Rep. No. 96-316, at 12-13. *See* p. 25 *supra*.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the decision below and, in so doing, should declare that Section 504 of the Rehabilitation Act of 1973 provides to victims of employment discrimination a private right of action against a recipient of federal financial assistance, without regard to the purpose of the assistance, and that monetary relief may be awarded in such an action.

Respectfully submitted,

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

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OF THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONER

The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioner.[1]

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors com-

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[1] Their consents have been filed with the Clerk of the Court.

posed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Many of EEAC's members participate in federally subsidized programs and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accordingly, EEAC's members have a direct interest in the issue presented in this case; *i.e.*, whether, to state a claim of employment discrimination under Section 504, a plaintiff-employee must show that he is a participant in a program in which he is the intended beneficiary of federal financial assistance and that he has exhausted administrative remedies.[2]

SUMMARY OF ARGUMENT

The legislative history of the Rehabilitation Act of 1973 and its two amendments shows that Title VI of the 1964 Civil Rights Act is the source of the meaning and scope of Section 504. Whether sought by a private plaintiff or a government agency, relief for employment discrimination is not available under Title VI or Section 504 unless the primary objective of the federal assistance received by the employer is to provide employment. *See, e.g., Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979).

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[2] Because of its interest in issues arising out of Section 504, EEAC filed briefs as Amicus Curiae in the Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) and *University of Texas v. Camenisch*, 101 S. Ct. 1830 (1981). EEAC has also filed briefs in the Court involving Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 in *Guardians v. Civil Service Commission*, No. 81-431 (1982); *Cannon v. University of Chicago*, 441 U.S. 677 (1979); and *North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982). An intepretation of the scope and legislative histories of those two statutes is relevant to the resolution of the issues in this case.

Furthermore, Congress did not create under Title VI, or intend to create under Section 504, a right of action for private individuals against recipients of federal financial assistance prior to an administrative determination. Thus, in *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980), the Seventh Circuit stated that its decision in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977), upon which other courts, including the Third Circuit, have relied to imply a private right of action under Section 504, was dependent upon the absence of a regulatory enforcement scheme. That enforcement scheme has since been instituted. Virtually every federal agency, including the Department of Transportation, now has in place administrative procedures for handling complaints of the nature presented here. In sum, in order for an otherwise qualified handicapped, plaintiff-employee to have standing under Section 504, the complainant must have been the intended beneficiary in a program receiving federal funds and have exhausted his administrative remedies.

ARGUMENT

I. IN ORDER TO STATE A CLAIM UNDER SECTION 504, AN EMPLOYEE MUST SHOW THAT HE IS A PARTICIPANT IN A PROGRAM IN WHICH HE IS AN INTENDED BENEFICIARY OF FEDERAL FINANCIAL ASSISTANCE.

When Congress enacted Section 504 of the Rehabilitation Act in 1973, Title VI of the 1964 Civil Rights Act served as the source of its jurisdictional scope. This scope was reaffirmed in 1978 when Congress amended the Act to provide that the "remedies, procedures and rights" of Title VI are applicable to employment. Thus, as under Title VI, in order for a plaintiff-employee to have standing under Section 504, the complainant must have been an intended beneficiary of a program receiving federal funds and have exhausted his administrative remedies.

A. Title VI of the 1964 Civil Rights Act, Not Title IX of the 1972 Education Amendments, Served As the Source of the Meaning and Scope of Section 504 At the Time It Was Enacted.

Although written broadly, Section 504, 29 U.S.C. § 794, addresses itself only to handicap discrimination against the participants and beneficiaries of federally assisted programs. The wording chosen by Congress, when read in conjunction with its legislative history, makes clear that Section 504 is designed to protect from handicap discrimination only those persons for whose benefit the federally funded programs are established. *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1227 (7th Cir. 1980). It does not by its terms regulate the general employment practices of recipients in circumstances in which employees are not the intended beneficiaries of federal monies.

The Third Circuit erroneously concluded, however, that Section 504's legislative history supports the position that Section 504 prohibits employment discrimination against handicapped persons by federal grantees regardless of the nature and purpose of the federal assistance and irrespective of who are the intended beneficiaries of that assistance. The court erred in part because it misapplied this Court's analysis of a similarly worded provision in Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, prohibiting sex discrimination in programs receiving federal financial assistance. *See North Haven Bd. of Educ. v. Bell*, 102 S. Ct. 1912 (1982). In doing so, the appellate court failed to recognize the differences in the legislative histories and structures of the two statutes. *See North Haven*, 102 S. Ct. at 1922 ("For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them.").

Thus, in examining the legislative history of Section 504 to determine its jurisdictional scope, the court of appeals failed to give due weight to the legislative history

of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et. seq.* (Title VI), as the source of the meaning and scope of Section 504 at the time it was enacted. Consequently, it misconstrued the legal effect of the 1978 amendments to the Rehabilitation Act as narrowing the scope of Section 504, when in fact its scope remained unchanged. Instead, the effect of the 1978 amendments to the Rehabilitation Act was to codify existing administrative regulations which made available the "remedies, procedures and rights" of Title VI. See pp. 20-24, *infra*.

As recognized by the Third Circuit, both Title IX and Section 504 were modeled after Title VI and broadly describe the benefited classes. Unlike Section 504 at the time of its enactment, both Title VI and Title IX adopted an administrative scheme for terminating federal assistance "in the particular program, or part thereof" in which discrimination of intended beneficiaries by the recipient is found. The significant difference between Title IX and Title VI, however, is the omission from Title IX of the following language found in Section 604 of Title VI, 42 U.S.C. § 2000d-3 (hereafter "Section 604" language):

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any practice of any employer, employment agency, or labor organization *except where a primary objective of the Federal financial assistance is to provide employment.* (Emphasis added.)

In *North Haven*, this Court concluded that the deletion of the Section 604 language in the Conference Committee when Title IX was being considered, in conjunction with its analysis of other legislative history, verified that Section 901 of Title IX prohibited gender discrimination in employment. 102 S. Ct. 1919-1923. For reasons set forth below, however, the Court's conclusions regarding the broad applicability of Title IX to employment are not applicable to Section 504.

Although the legislative history associated with Title IX is limited, the legislative history associated with Section 504 is even more sparse. In determining that Section 504 at its inception applied broadly to employment practices, the Third Circuit relied on general expressions of Congressional concern over discrimination against the handicapped in employment and the need to encourage employment opportunities for the handicapped. But what the appellate court failed to recognize is that general references to employment in the legislative history do not diminish the established scope of Section 504, as derived from Title VI, and the plain meaning of the Section 604 language, that Section 504 does not apply to employment unless the employee-plaintiff is an intended beneficiary of the financial assistance. Indeed, none of the legislative history relied on by the court below demonstrates an intent of Congress to expand the scope of Section 504 beyond specific programs receiving federal assistance. Instead, this legislative history should be read merely as statements of philosophy and policy in the context of the millions of dollars being allocated to improve the circumstances of the handicapped.

Section 504 was added to the Rehabilitation Act because of the failure of Congress to enact amendments to Title VI proposed by Congressman Vanik and Senator Humphrey that would have added coverage for the handicapped.[3] The purpose of the rejected Title VI amendments was to cover education and vocational training[4] and both sponsors indicated their satisfaction that Section 504 incorporated their proposals.[5] Accordingly, at the

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[3] *See* H.R. 12,154, 92d Cong., 1st Sess. (1971); H.R. Rep. 13,947, 92d Cong., 2d Sess. (1971); 118 Cong. Rec. 32,310 (1973) (remarks of Sen. Humphrey).

[4] 117 Cong. Rec. 45,974 (1971) (remarks of Rep. Vanik).

[5] 119 Cong. Rec. 18,137 (1973) (remarks of Rep. Vanik). *See also* prepared statement of Senator Humphrey, 118 Cong. Rec. 32,310 (1973) stating that both Section 503 and Section 504 carry through the intent of original bills which he had "introduced . . . this year

time of enactment of Section 504, Title VI, not Title IX, established the scope of Section 504. Indeed, Congressman Vanik's and Senator Humphrey's proposals to amend Title VI preceded the consideration and enactment of Title IX. Thus, the Seventh Circuit in *Simpson* found that "the different language . . . and the different legislative history of Title IX demonstrate more clearly than does the language and legislative history of Section 504 exactly who are the beneficiaries of Title IX protection" and that Title VI case authority is more compelling in determining Section 504's scope. 629 F.2d at 1236 (footnote omitted). The conclusion that Section 601 of Title VI serves as the source of meaning of Section 504 is reinforced by Congress' 1978 amendments to the Rehabilitation Act making the "remedies, procedures and rights" of Title VI applicable to Section 504.

B. The Legislative History of Section 601 of Title VI, From Which Section 504 Was Derived, Shows That Even Without Section 604's Language Limiting the Employment-Related Scope of Title VI, Section 601 Did Not Encompass Employees Unless They Were the Intended Beneficiaries of Financial Assistance.

As recognized by the Third Circuit, Section 504 was modeled after Title VI and uses nearly the same words to describe its scope. Because the words used in Section 504 are derived from Section 601 of Title VI, their meaning as reflected in Title VI's legislative history is relevant in determining the scope and meaning of Section 504 at the time it was enacted.

In the original Administration bill proposing the Civil Rights Act of 1963, Section 601 of Title VI included a provision prohibiting employment discrimination in pro-

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. . . to amend . . . Title VI and Title VII and the Civil Rights Act of 1964." Clearly, however, even under the broad interpretation of Section 504 by the Third Circuit, Section 504 can not be equated with amending Title VII because the scope of Title VII is not limited to those programs receiving federal financial assistance as is the case under Section 504.

grams receiving federal assistance.[6] Subsequently, during the summer of 1963, the Administration drafted a new version of the Civil Rights Act containing the language now found in Section 601, which did not expressly provide that Title VI extended to employment practices. All provisions relating to employment, however, were placed in an expanded Title VII.[7] *Even before Section 604 was added to Title VI*, both Houses of Congress and the Justice Department understood that this revision of Title VI was intended to confine its protection to beneficiaries of federal programs, but not those employed to provide those benefits.[8] Indeed, in a letter in response to a specific question on this point from Senator Cooper, Attorney General Robert Kennedy, the Administration's primary spokesman on the Civil Rights Act, stated:

> *Title VI is limited in application to instances of discrimination against the beneficiaries of Federal assistance programs as the language of section 601 clearly indicates.* Where, however, *employees* are the *intended beneficiaries* of a program, Title VI would apply. Thus, for example, creation of job opportunities is one of the major purposes of the accelerated public works program. Hence construction employees would be deemed beneficiaries of such a program

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[6] *See* S. 1731, 88th Cong., 1st Sess. (1963), *as reported in Cannon v. University of Chicago*, 441 U.S. 677, 693-94 n.14 (1979).

[7] *See* H.R. 7152, 88th Cong., 1st Sess. (1963).

[8] *See Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) at 331, 335 (remarks of Sen. Ervin); *Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. (1964) (hereafter *House Judiciary Committee Hearings*) at 2685 (testimony of Attorney General Kennedy), 2774 (letter from Deputy Attorney General Katzenbach to Rep. Celler); *Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess. (1964) (hereafter *House Rules Committee Hearings I*) at 141, 198, 200 (remarks of Rep. Celler); 228-230 (remarks of Rep. McCulloch); 110 Cong. Rec. 1518-19 (1964) (remarks of Rep. Celler); *id.* at 1602 (remarks of Rep. Mathias); and *id.* at 10,076 (letter from Attorney General Kennedy to Sen. Cooper).

> and section 602 would require the administering agency to take action to prohibit racial discrimination against them in such a program. On the other hand, the Agricultural Adjustment Act and acreage allotment payments under it is a commodity program having nothing to do with farm employment. Farm employees are not beneficiaries of that program, and section 602 would not authorize any action to require recipients of acreage allotments to refrain from racial discrimination in employment. (Emphasis added.)

110 Cong. Rec. 10,076 (1964).

Notwithstanding these clear and unequivocal statements of Administration representatives and other proponents of the Civil Rights Act that Title VI did not apply to employment except in the limited circumstance where employees are the *intended* beneficiaries of a program, at least one opponent of Title VI construed its words to include both employees as well as beneficiaries.[9] Thus, when the Senate began consideration of H.R. 7152 (which had passed the House of Representatives), in order to clarify the intended meaning of the House bill, the Dirksen-Mansfield substitute (which eventually became the Civil Rights Act of 1964) was offered to improve upon the draftsmanship of the House bill.[10] Consistent with the objectives of making "a number of points clearer and more specific" and "express[ing] in specific legislative language what always has been intended",[11] Section 604 was added. As noted by Senator Humphrey, the Senate floor leader for the Civil Rights Act: "We have made no changes of substance in title VI . . . . We have made several minor adjustments and, in addition, we have modified the language to make explicit the declared in-

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[9] *See House Rules Committee Hearings I* at 379-80 (remarks of Rep. Poff); 110 Cong. Rec. 2484-85 (1964) (remarks of Rep. Poff).

[10] 110 Cong. Rec. 12,707 (1964) (remarks of Sen. Humphrey).

[11] *Id.*

tention of this title." [12] With respect to the new Section 604, he stated that: "This provision is in line with the provisions of section 602 and serves to spell out more precisely the declared scope of coverage of the title." [13]

Thus, Section 604 merely made clear what always had been intended by the words in Section 601 that "[n]o person . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any [federally assisted] program or activity." That is, Section 601 covers intended beneficiaries under such programs but does not encompass persons employed in connection with such programs unless the primary purpose of the federal assistance is the creation of jobs. *See Ass'n Against Discrimination v. City of Bridgeport*, 647 F.2d 257, 276 (2d Cir. 1981) *cert. denied*, 102 S. Ct. 1611 (1982).[14] The legislative history of Title VI clearly demonstrates, therefore, that the presence or absence of Section 604 in Title VI was superfluous in that it was added to spell out the original scope and meaning of Section 601.[15]

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[12] *Id.* at 12,714.

[13] *Id.* at 12,720. *See also Hearings on H. Res. 789 Before the House Committee on Rules*, 88th Cong., 2d Sess. (1964) (hereafter House Rules Committee Hearings II) at 6, 7 (testimony of Rep. Celler).

[14] *See Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1235-36 n.17 (7th Cir. 1980); and *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1980), and the Title VI legislative history cited therein. Both appeals courts found that the legislative history of Title VI lends strong support to the conclusion that Congress did not intend protection under Title VI to any person other than an intended beneficiary of federal financial assistance. *See also Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982); *United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); and *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 977 (1979).

[15] *See* p. 8 & n.8, *supra*.

Because the language defining the scope of Section 504 is derived from Section 601, the applicability of Section 504 to general employment practices at the time of its enactment was the same as that of Title VI, unless the legislative history of Title 504 shows a clear and unambiguous legislative intent to the contrary. Even though Section 504 at the time of enactment did not contain express language equivalent to Section 604, a review of Section 504's legislative history does not reveal any intent to change the meaning of the words in Section 601 which also define the jurisdictional scope of Section 504.

C. Section 504 is Program Specific and, Therefore, Protects Only the Intended Beneficiaries of Federal Funded Programs from Discrimination.

A handicapped individual has standing under Section 504 only if he can "show that the program or activity with which he or she was involved, or from which he or she was excluded, itself received or was directly benefited by federal financial assistance." *Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. 1981). "The receipt of federal financial assistance by a multiprogram entity, for specific application to certain programs or activities, does not, without more, bring all of those multiple programs or activities within the reach of Section 504." *Id.* at 767. In *Simpson*, the Seventh Circuit explained the reason for this conclusion:

> The statute does not, as plaintiff seems to contend, generally forbid discrimination against the handicapped by recipients of federal assistance. Instead, its terms apparently require that the discrimination must have some direct or indirect effect on the handicapped persons in the program or activity receiving federal financial assistance. To be actionable, the discrimination must come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminu-

> tion of the benefits he would otherwise receive from the program.

629 F.2d at 1232.[16]

The statute and its history support this view. First, the language of Section 504 itself limits its application to handicapped individuals "excluded from the participation in, . . . denied the benefits of, or . . . subjected to discrimination *under any program or activity receiving Federal financial assistance.*" 29 U.S.C. § 794 (emphasis added). Second, the legislative history of Section 504 when it was enacted makes clear that it was to have a program specific scope.[17] Third, Section 504 was derived from Section 601 of Title VI, and the legislative history of Title VI clearly demonstrates that it was program specific; that is, Title VI's provisions applied only to the program receiving the financial assistance. *See* Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 50-54, 65-67 (1976).

During the debates on the 1964 Civil Rights Act, concern was continually expressed that Title VI would permit intervention into every aspect of the operations of recipients. In response to those concerns, Title VI was redrafted to make it program specific, and the floor statements in both Houses confirm this intent.[18] Moreover, in response to a request from Representative Celler, chair-

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[16] *See also Carmi*, 620 F.2d at 674; *Sabol v. Board of Education*, 510 F. Supp. 892, 895 (D.N.J. 1981); *Cain v. Archdiocese of Kansas City*, 508 F. Supp. 1021, 1025 (D. Kan. 1981); *Reynolds v. Ross*, 25 FEP Cases 462, 467 (N.D.N.Y. 1981); *Flora v. Moore*, 461 F. Supp. 1104, 1115-16 n.9 (N.D. Miss. 1978).

[17] *See, e.g.*, discussion of Section 504 at 118 Cong. Rec. 32,294 (Senate Report); *id.* at 32,307 (remarks of Sen. Stafford); *id.* at 32,310 (remarks of Sen. Humphrey).

[18] *See* 110 Cong. Rec. at 1518-19, 21 (remarks of Rep. Celler); *id.* at 1542 (remarks of Rep. Lindsay); *id.* at 1602 (remarks of Rep. Mathias); *id.* at 2480-81 (remarks of Rep. Ryan); *id.* at 6545 (remarks of Sen. Humphrey); and *id.* at 7060 (remarks of Sen. Pastore).

man of the House Judiciary Committee, concerning a list of programs and activities involving federal financial assistance within the scope of H.R. 7152 (which was later given greater specificity in section 601 of the Dirksen-Mansfield substitute), Deputy Attorney General Katzenbach stated:

> The impact of title VI is further limited by the fact that it relates only to participation in, receipt of benefits of, or discrimination under, a federally assisted program. As to each assisted program or activity, therefore, title VI *will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect of whom the policy declared by Title VI would apply.*

House Judiciary Hearings at 2774. Furthermore, as the 1964 Civil Rights Act worked its way through the House and Senate, the question frequently arose as to whether assistance to one program could be cut off because of a finding of discrimination in another. The Administration's cabinet-level representatives consistent answer was that it could not.[19]

A reading of the floor debates on Title VI in both Houses, moreover, reinforces the conclusion that under no circumstances would discrimination in one program justify action with respect to any other program. The Senate floor leader for Title VI emphasized that "[p]articipation in one program would not justify the exaction of a non-discrimination assurance concerning some other pro-

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[19] *See, e.g., Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, ser. 4, pt. II, 88th Cong., 1st Sess. 1543 (1963) (colloquy between Representative Meader and HEW Secretary Celebrezze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program); *Hearings on H.R. 7152, As Amended by Subcomm. No. 5, Before the House Comm. on the Judiciary*, ser. 4, pt. IV, 88th Cong., 1st Sess. 2766 (1963) (Attorney General Kennedy indicated that the termination of assistance be limited to the particular *program* and *location* where the discrimination exists).

gram." [20] Similarly, Senator Ribicoff, one of the two authors of the version of Title VI passed by the House, pointed out that "[u]nder no circumstances" would discrimination in one program justify any action with respect to any other program.[21] These repeated assurances that assistance in one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in Title VI of the so-called "pin-point" termination provision found in Section 602, 42 U.S.C. § 2000d-1, which limits any termination of federal assistance to the "particular program, or part thereof," in which the discrimination is found.

When the final version of the 1964 Civil Rights Act was proposed in the Senate, Title VI contained the program specific provision. As explained in the Senate debates, "[t]he new language will ensure that Federal funds will be cut off for only those political entities or particular programs or parts of programs in which discrimination is practiced." [22] Moreover, Senator Humphrey, floor leader for the Civil Rights Act, stated that the revisions clarified that "any termination shall affect only the particular program, or part thereof," in which discrimination occurs.[23] Finally, House Judiciary Chairman Celler confirmed Senator Humphrey's interpretation when he appeared before the House Rules Committee to describe the Senate amendments to the bill, stating that "aid to a particular program, will not be cut off because one part of the program or institution is being operated in violation of the law." [24]

This view of legislative history of Title VI has been affirmed by the courts. In *Bd. of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969), the Fifth Circuit held that programs could not be con-

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[20] 110 Cong. Rec. 7059 (1964) (remarks of Senator Pastore).

[21] *Id.* at 7067 (remarks of Senator Ribicoff).

[22] *Id.* at 12,689 (remarks of Senator Saltonstall).

[23] *Id.* at 12,714-15 (remarks of Senator Humphrey).

[24] House Rules Committee Hearings II at 6.

demned by association. The court refused "to assume, contrary to the express mandate of [the statute], that defects in one part of the school system automatically infect the whole." 414 F.2d at 1074. Thus, funds under Title VI are not to be denied or terminated in a federally assisted program unless there is an express finding of discrimination in a particular program. *See also North Haven*, 102 S. Ct. at 1926 (Section 901 of Title IX held to be program-specific by the Court).

The legislative history and the decisions of the courts make clear, therefore, what is evident from the statutory language—federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B". Furthermore, a remedy for the aggrieved is not available unless it is proven that the complainant participated in a program which received federal financial assistance and was the intended beneficiary of that assistance. *Carmi*, 620 F.2d at 674-75 & n.4. These Title VI standards apply to Section 504 because the source of its scope is Title VI as codified by the 1978 amendments to the Rehabilitation Act.[25] *Id.*; *Simpson*, 629 F.2d at 1234. Consequently, to have standing under Section 504, the plaintiff must plead and prove as a jurisdictional prerequisite that the particular activity he participated in received federal financial assistance and that he was the intended beneficiary of that assistance. *Id.* In the instant matter, the facts show that the petitioner was a recipient of federal assistance but do not show that the plaintiff participated in a program receiving such assistance or was an intended beneficiary of the federal grant.

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[25] As discussed in more detail below (see pp. 20-24), Congress in 1978 amended Section 504 by specifying that the "remedies, procedures and rights set forth in Title VI," including the Section 604 language, apply to Section 504. 92 Stat. 2982. By doing so, Congress was expressly reaffirming and codifying the existing scope of Section 504 with respect to employment discrimination; that is, it applies only to intended employee-beneficiaries of federal assistance.

II. SECTION 504 DOES NOT CREATE AN ADDITIONAL PRIVATE RIGHT OF ACTION BEYOND THE RIGHT TO SEEK JUDICIAL REVIEW OF AN ADVERSE AGENCY ACTION.

A. The Legislative History of the Rehabilitation Act of 1973 and Its Two Amendments Does Not Support an Implication of a Right of Action Under Section 504 for Private Individuals Against Recipients of Federal Funds Prior to an Administrative Determination.

The question of whether a statute creates a cause of action, expressly or by implication, is essentially a matter of statutory construction. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979); *Cannon*, 441 U.S. at 688 (1979). "[T]he fact that a federal statute may have been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Cannon*, 441 U.S. at 688. Rather, as recognized in recent decisions of this Court, the central inquiry in such cases is whether it is clear that Congress intended to create the private remedy asserted. *California v. Sierra Club*, 101 S. Ct. 1775, 1779 (1981); *cf. Cannon*, 441 U.S. at 731 (Powell, J., dissenting) ("Absent the most compelling evidence of affirmative congressional intent, a federal court should not infer a private cause of action.").

Section 504 as enacted in 1973 does not explicitly create a right for anyone to bring suit in federal court. Moreover, the only contemporaneous legislative history is one sentence which refers to the provision as a mere policy proclamation.[20] This characterization is not surpris-

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[20] S. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 2076, 2123, stated: "The bill further includes a provision proclaiming a *policy* of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." (Emphasis added.)

ing because the Rehabilitation Act of 1973 was not a civil rights statute but rather a massive appropriations law aimed both at subsidizing handicapped individuals—especially the severely handicapped—and developing new programs to assist in their assimilation into society. 118 Cong. Rec. 32,279 (remarks of Senator Cranston). It was enacted primarily to improve the states' delivery of vocational rehabilitation services to handicapped individuals.

In sum, Section 504 stood alone within the Rehabilitation Act of 1973, unaccompanied by any implementation provisions. No authority was delegated to any agency to promulgate or enforce regulations under the Act. These omissions are in contrast with the language of Section 503 of the Rehabilitation Act, which contained provisions mandating the promulgation of regulations and the establishment of a complaint procedure within the Department of Labor. 29 U.S.C. § 793. Thus, no private right of action can be inferred under Section 504, because no rights to administrative process or other action was evidenced by the statute.

1. *The 1974 Amendments.*

Notwithstanding this contemporaneous legislative history indicating that Section 504 was no more than a policy statement, numerous courts between 1973 and 1978 concluded that Section 504 authorizes a private right of action. All of the courts of appeals that reached this conclusion, including the Third Circuit, have based their decisions on the decision of the Seventh Circuit in *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977).[27]

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[27] *See N.A.A.C.P. v. Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979); *Camenisch v. University of Texas*, 616 F.2d 127, 131 (5th Cir. 1980), *vacated as moot*, 101 S. Ct. 1830 (1981); *Davis v. Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978); *United Handicapped Federation v. Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Kampmeier v. Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); and *Leary v. Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977).

In *Lloyd*, the court relied heavily on the legislative history of the 1974 amendments to the Rehabilitation Act, which amended the definition of "handicapped individual" but did not in any way modify Section 504. Although the Act was amended for this limited purpose, the report written to support overriding the presidential veto of the 1974 amendments included language which extended beyond the scope of the amendments and attempted to clarify Congress' intent in 1973 regarding Section 504. Specifically, the Senate Committee report stated that: (1) Section 504 was patterned after the nondiscrimination language pertaining to recipients of federal financial assistance in Section 601 of Title VI and Section 901 of Title IX; (2) although not specifically required by Section 504, regulations were to be promulgated; and (3) the enforcement provisions of Section 504 were to be patterned after the implementing regulations of Title VI, 45 C.F.R. Parts 80 and 81, and Title IX, 45 C.F.R. Part 86. S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974).

The appellate court in *Lloyd* interpreted this legislative history to mean that Section 504 "contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court. . . ." 548 F.2d at 1286. But the Seventh Circuit concluded that the plaintiff had a private right of action under the factual circumstance in *Lloyd* because:

> [S]till it is plain that the rights of the handicapped were meant to be enforced at some point through the vehicle of a private cause of action. When administrative machinery does not exist to vindicate an affirmative right, there can be no objection to an independent cause of action in the federal courts.

Id. at 1286 (footnote omitted). Significantly, in *Simpson*, 629 F.2d at 1229, the Seventh Circuit pointed out that the assumption by other courts that it implied a private right of action under Section 504 in *Lloyd* "may reflect an oversimplified view of that case and ignores

the limitations there expressed." The appellate court reiterated that in *Lloyd* it had found a private right of action solely on the basis, that, unlike present circumstances, at the time of its decision there did not exist remedial administrative procedures under Section 504. *Id.* at 1230.

Thus, the Congressional intent that can be gleaned from the 1974 committee report at most shows that Congress intended the enforcement provision of Section 504 to be patterned after existing Title VI and Title IX regulations. There is no indication in the report that Congress assumed that Title VI created a private remedy. Nor is there evidence in the legislative history that any Member of Congress voted in favor of either the 1973 statute or the 1974 amendments in reliance of an understanding that Title VI provided a private remedy.[28]

Furthermore, a conclusion that there is a private right of action under Section 504 is not justified by the following sentence in the 1974 Senate report:

> This approach to implementation of section 504, which closely follows the models of Title VI and Title IX, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*

S. Rep. No. 93-1297 at 39-40 (emphasis added). The *Lloyd* court—the only court to construe this sentence—stated that this phrase "contemplates judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court . . . ." 548 F.2d at 1286. The entire passage from the Senate re-

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[28] This Court has never explicitly held that Title VI contemplates a private right of action and Amicus believes there is none for reasons well-stated in Justice White's dissenting opinion in *Cannon*, 441 U.S. at 718-31. (White, J. and Blackmun, J., dissenting); and separate opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 379 (1978) (separate opinion of White, J.).

port can be considered nothing more than a directive to the Department of Transportation (DOT) and other administrative agencies to enforce Section 504 as the Department of Health, Education, and Welfare (HEW), was already enforcing Title VI and Title IX. If DOT, for example, should arbitrarily and capriciously abuse its enforcement powers, an aggrieved recipient of federal financial assistance would clearly be entitled to obtain judicial review of agency action, the "judicial remedy through a private action" contemplated by Congress. The defendant in such an action would be not the recipient of federal funds, and review would be limited to the administrative record, to determine whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record as a whole. *See Camp v. Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

Although not explicitly authorized by Section 504 until the passage of the 1978 amendments to the Rehabilitation Act (discussed below), at least 15 federal agencies including DOT, 45 Fed. Reg. 31,442, have issued virtually identical Section 504 regulations. Consequently, as a result of Executive Order 11914, 41 Fed. Reg. 17,871, which authorized HEW to coordinate the implementation of Section 504 by all federal departments and agencies, there now exists a uniform regulatory framework for Section 504. (*See also* Executive Order 12250, 45 Fed. Reg. 72,995 (1980), giving coordination authority to the Department of Justice). There now being a consolidated enforcement program under Section 504, "the judicial remedy available must be limited to post-administration remedy judicial review." *Lloyd*, 548 F.2d at 1286 n.29.

2. *The 1978 Amendments.*

The legislative history of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 likewise confirms that alleged discriminatees may not enter federal court except to seek review

of adverse administrative action pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* As with the original Act in 1973, the principal thrust of the 1978 amendments was to expand the vocational rehabilitation, research, training, and construction programs and, additionally, to create a permanent authorization of appropriations for the basic federal-state vocational rehabilitation program. 29 U.S.C. § 701. Unlike in 1974, some of the amendments affected Section 504.

Section 504 was amended to authorize agency heads to promulgate agency regulations. In this respect, Section 504 now parallels Section 503, as enacted in 1973, because both now require implementing regulations and administrative enforcement.[29] Congress also added a new Section 505, which explicitly grants a private right of action to alleged victims of handicap discrimination in federal employment under Title VII of the Civil Rights Act of 1964, but then rejects that approach for Section 504 complainants by specifying that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964" apply to Section 504 violations. By doing so, Congress was merely codifying the HEW regulation, 45 C.F.R. § 84.61, which made available to Section 504 complainants the "remedies, procedures and rights" of Title VI—which, again, do not provide for or contemplate a private cause of action for alleged victims of discrimination directly against alleged violators.[30]

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[29] Because Section 503 as enacted contained an administrative enforcement scheme, courts have viewed this express remedy as a strong indication that Congress did not intend to provide a private judicial remedy as well under Section 503. *See, e.g., Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 246 (1980).

[30] "Obviously, when Congress wished to provide a private . . . remedy [under the Rehabilitation Act], it knew how to do so and did so expressly." *Touche Ross*, 442 U.S. at 572. In view of the express judicial remedy provided in Section 501 and the express administrative remedy provided in Section 504, "it is highly improbable that

That Section 505 authorizes discretionary awards of attorney's fees to the prevailing party, other than the United States "in any action or proceeding to enforce or charge a violation of" Section 504, does not indicate that Congress intended a private right of action. Rather, this provision applies to administrative proceedings pursuant to the incorporated Title VI regulations, together with the limited judicial review authorized by Title VI itself, 42 U.S.C. § 2000d-2. Like the portion of the legislative history of the 1974 amendments which was construed by the Seventh Circuit in *Lloyd*, these provisions of the 1978 amendments contemplate "judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F.2d at 1286.[31]

Nothing in the legislative history of the 1978 amendments indicates otherwise. The floor statements of Senators Cranston,[32] Stafford[33] and Bayh,[34] the committee

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Congress absentmindedly forgot to mention an intended private action" for Section 504. *Transamerica*, 444 U.S. at 20, *citing Cannon*, 441 U.S. at 742 (Powell, J., dissenting).

This Court has refused to infer private rights of actions where administrative or like remedies are expressly available. *See, e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (1974). *See also Transamerica Mortgage Advisors*, 444 U.S. at 19 ("where a statute expressly provides a particlar remedy or remedies, a court must be chary of reading others into it.").

[31] *See Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir. 1980) ("[I]t does not necessarily follow that the [attorney's fees] amendment is intended to authorize private individuals to file civil actions"); *Cf. Simpson*, 629 F.2d at 1243 ("We are left without any indication that, contemporaneous with its adoption of § 503, Congress intended to extend a private remedy").

[32] 124 Cong. Rec. S15590-91, 15593 (daily ed. September 20, 1978); *id.* at S19001 (daily ed. October 14, 1978).

[33] *Id.* at S18999-S19000 (daily ed. October 14, 1978).

[34] *Id.* at S15593 (daily ed. September 20, 1978). In all of the court cases relied on by Senator Bayh, none explicitly held that a

reports,[35] and the conference reports[36] indicate no more than that the amendments to Title V of the Rehabilitation Act contemplate a right to seek judicial review of administrative action.[37] Significantly, Senator Cranston clearly distinguished the provisions of the amendments applicable to Section 504 from those applicable to Section 501, which explicitly extended Title VII rights, remedies and exhaustion requirements to qualified federal employees who are victims of handicap discrimination.[38] Moreover, the House Conference Report, which accepted the Senate's proposals concerning attorney's fees and the applicability of Title VI rights, remedies and procedures to Section 504, also unequivocally differentiated between the private right of action available to federal employees and the procedures available to aggrieved handicapped under Section 504.[39] Given the proximity of Section 501 to Section 504, the conclusion is inescapable—Congress obviously knew how to create an independent judicial remedy for persons covered by Section 504, but failed to do

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private right of action was available under Title VI, and 42 U.S.C. § 1983 provided an alternative and express cause of action in those cases.

[35] S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).

[36] H. Rep. No. 95-1780, Conf. Rep., 95th Cong., 2d Sess. (1978) *as reported in* 124 Cong. Rec. H 12720 (daily ed. October 12, 1978).

[37] To the extent that the remarks of the three Senators seem to indicate that the 1978 attorney's fees provision reflects Congress' original intent that Section 504 included a private right of action, this Court placed little weight on such subsequent legislative history relating to the effect of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, on a similar right under Title IX. *Cannon*, 441 U.S. at 686 n.7. *See also Southeastern Community College*, 442 U.S. at 411 n.11. It is significant to note, moreover, that, unlike Title IX, Section 504 did not contain a provision for the award of attorney's fees contemporaneous with passage of the Act. *See Cannon*, 441 U.S. at 699 & n.25.

[38] *Compare* 124 Cong. Rec. S15591 *with* S15593 (daily ed. September 20, 1978).

[39] 124 Cong. Rec. H12720 (daily ed. October 12, 1978).

so, just as it has so often in the past rejected similar proposals in the form of amendments to Title VII. See Appendix A. *See Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200, 202 (N.D. Tex. 1977).

In sum, there is no evidence whatsoever in Section 504's history of a Congressional intent to provide for the type of private suit occurring in this case. Congress intended to foreclose private litigation about alleged handicap discrimination by recipients of federal financial assistance until a final agency determination has been made. Congress is entitled to assume that the judiciary will recognize the "balance, completeness, and structural integrity" of its statutes and abstain from interference with the "careful blend of administrative and judicial enforcement powers" [40] contained in Title VI and incorporated by reference into Section 504 This Court has never demanded that Congress insert into a statute or its legislative history a sentence to the effect that "no court shall imply any additional remedies hereunder" as precondition to its refusal to "expand the coverage of the statute to subsume other remedies." [41]

B. Implication of a Private Right of Action Under Section 504 Would Interfere With the Legislative Purpose of the Rehabilitation Act.

It is important to view Section 504 within "the context of the entire legislative scheme" [42] of the Rehabilitation Act of 1973, as amended. As previously noted, as enacted in 1973, the purpose of the Rehabilitation Act was to provide massive appropriations to improve the delivery of vocational rehabilitation services. In contrast to the legislative histories associated with Titles VI and

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[40] *See Brown v. GSA*, 425 U.S. 820, 833 (1976).

[41] *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[42] *Morris v. Gressette*, 432 U.S. 491, 501 (1977), *citing Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967).

IX, there were no legislative findings regarding discrimination with respect to the handicapped. Although not specifically required by the Act, an administrative enforcement mechanism was established, which was codified by the 1978 amendments. Thus, in 1978 the primary jurisdiction over enforcement of Section 504 was committed, not to the courts, but to federal agencies which Congress presumed had developed the expertise to prevent discrimination against qualified handicapped persons.

Clearly, the legislative purpose of Section 504 is better served by agency enforcement, and judicial review of agency action, than by private suits. Unlike race, color, national origin, or sex discrimination, which are addressed in Title VI and Title IX, "handicapped discrimination" is not susceptible to precise categorization. It is different in kind and does not necessarily have the same effect on equal opportunity as with other forms of discrimination. *See* 41 Fed. Reg. 20,296 (1976) (Letter of HEW Secretary Mathews accompanying the publication of the initial proposed Section 504 regulations of HEW). Thus, determinations of handicap discrimination involve the resolution of two significant threshold issues not present in resolving discrimination complaints under Title VI and Title IX: (1) the determination of who meets the statutory definition of a "handicapped individual," [43] and (2) the determination of when equal treatment violates the statute. Because the answers to these questions are novel and complex, judicial implication of a private right to sue under Section 504 would defeat the legislative purpose that before federal courts become involved, the administrative agencies should be given an opportunity to apply their expertise to these issues in the context of remedying handicapped discrimination in programs for which they provide financial assistance. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 767-68 (1947). This is no simple task.

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[43] See Appendix B.

While there may be no difficulty in determining if a person is a "handicapped individual" under the Act if their impairment involves, for example, blindness or a mobility handicap, less disabling impairments present problems in terms of whether the statutory definition of "handicapped individual" is met. *See E. E. Black v. Marshall*, 497 F. Supp. 1088 (D. Hawaii 1980) (lower back condition).[44] Likewise, the problems involving application of the statute to "handicapped individuals" are equally difficult, requiring an administrative assessment before judicial review. *See Bentivegna v. U.S. Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982) (controlled versus uncontrolled diabetes). Handicaps differ widely in kind and degree, and there is no readily identifiable and homogeneous class of handicapped persons. Nor is there a class of nonhandicapped persons with whom treatment of handicapped persons can be compared. The Rehabilitation Act's definition of the handicapped, 29 U.S.C. § 706(7), is so broad that allegations of discrimination could not be restricted to readily identifiable classes of persons but undoubtedly would encourage complaints based upon disparate treatment of differently and uniquely handicapped individuals. This analysis becomes hopelessly complex because there is no fixed reference class with which treatment of others can be compared.

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[44] Moreover, administrators and judges have been struggling for years with definitions of disability in cases arising under the Social Security Act. The extreme difficulty in determining who is disabled, and to what extent, are illustrated by the conflicting medical testimony in a myraid of cases involving disability benefits, personal injuries, and workmen's compensation. *See, e.g., LeMaster v. Weinberger*, 533 F.2d 337 (6th Cir. 1976) (conflicting testimony as to whether claimant had or was disabled by multiple sclerosis); *see also*, Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 Harv. L. Rev. 833 (1976).

Although Congress chose to use the same term "discrimination"—as is found in Title VI and Title IX, Congress showed its caution by limiting the application of Section 504 to "otherwise qualified handicapped individuals" who face disparate treatment "solely" on the basis of handicap. Furthermore, Congress has consistently rejected attempts to amend Title VII, which does include an explicit private right of action, 42 U.S.C. § 2000e-5(g), to add handicap as a prohibited ground of discrimination. See Appendix A. Significantly, by incorporating the procedures and remedies of Title VI, with their explicit exclusion of employment practices from coverage except for federally subsidized jobs programs, Congress has shown in particular that it did not want employment discrimination lawsuits to arise under Section 504.[45] In addition, the courts have been particularly adverse to implication of private judicial remedies in matters involving employment practices under federal statutes and executive orders.[46] Judicially created employment litigation under the Rehabilitation Act would present, in the words of the courts in *Lloyd*, "the unseemly vista of a spotty application of ad hoc remedies in lawsuits in various regions of the country." 548 F.2d at 1286. In view of the cautious approach of Congress in this new area, and because Congress chose to establish an administrative scheme for handling these claims, rather than to provide for private causes of action, this Court should not create a direct judicial forum for resolving these complicated problems.

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[45] *See Trageser*, 590 F.2d at 89; *Simpson*, 629 F.2d at 1234-35.

[46] *See, e.g.*, the cases collected in *Rogers v. Frito-Lay, Inc.*, 433 F. Supp. at 202 n.1.

III. A PLAINTIFF-EMPLOYEE HAS NO STANDING TO SUE UNDER SECTION 504 UNLESS HE IS AN INTENDED BENEFICIARY OF OR A PARTICIPANT IN A PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE AND HAS EXHAUSTED AVAILABLE ADMINISTRATIVE REMEDIES.

If a private right of action can be implied under 504, to have standing to sue a plaintiff-employee must be an intended beneficiary of financial assistance. As discussed in detail above (see pp. 3-15, *supra*), the language of the statute and its legislative history support this limitation on a right of action under Section 504.

It is well-established, moreover, that a suit may not be brought under Title VI—the statute which determines the rights and remedies under Section 504—without exhausting administrative remedies under 42 U.S.C. § 2000d-2. *See Green Street Association v. Daley*, 373 F.2d 1, 8-9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).[47] The Title VI exhaustion requirement applies both to alleged victims of discrimination, as in the cases above, and to alleged violators of the statute, as in *School District of City of Saginaw, Michigan v. HEW*, 431 F. Supp. 147 (E.D. Mich. 1977). Under Section 504, exhaustion has been required before seeking court review. *See, e.g., Neal v. U.S. Postal Service*, 468 F. Supp. 958 (D. Utah 1979); *Doe v. New York University*, 442 F. Supp. 522, 523 (S.D.N.Y. 1978); *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978).

Furthermore, the complainant must fully exhaust administrative remedies It is not sufficient that a complaint has been filed with the administrative agency. *See*

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[47] *See also Cave v. Beame*, 433 F. Supp. 172 (E.D. N.Y. 1977); *Johnson v. County of Chester*, 413 F. Supp. 1299, 1310-11 (E.D. Pa. 1976); *Green v. Cauthen*, 379 F. Supp. 361, 378 (D. S.C. 1974); *Feliciana v. Romney*, 363 F. Supp. 656, 672-73 (S.D. N.Y. 1973); *Dupree v. City of Chattanooga*, 362 F. Supp. 1136, 1141-42 (E.D. Tenn. 1973).

Aircraft & Diesel Equipment Corp., 331 U.S. at 767-78 (1974).[48] Moreover, courts should be, and have been, reluctant to find relatively new administrative machinery insufficient before it has had a chance to prove its adequacy. *See Doe v. New York University*, 442 F. Supp. at 523; *Rogers v. Frito-Lay*, 433 F. Supp. at 203.

The need for agency investigation and determination is compelling in the field of handicap discrimination under Section 504 of the Rehabilitation Act. As former HEW Secretary Matthews stressed, handicap discrimination is "far more complex" than the discrimination prohibited by Title VI and Title IX.[49] As an agency which has had substantial experience administering programs for the rehabilitation of handicapped individuals, DOT is better equipped than the federal courts to make the initial investigation of complex factual situations and to formulate a consistent approach to handicap discrimination problems. Thus, exhaustion of administrative remedies should be required under Section 504 as well, with judicial review limited to such questions as whether DOT exceeded its statutory authority or abused its discretion.[50]

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[48] These policies were further explained and summarized in *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *McGee v. United States*, 402 U.S. 479, 484-85 (1971); *McKart v. United States*, 395 U.S. 185 (1969).

[49] 41 Fed. Reg. at 20,296.

[50] Alternatively, the complainant should be required to pursue his claims with DOT pursuant to the doctrine of primary jurisdiction. *See Crawford v. University of North Carolina*, 440 F. Supp. 1047 (M.D.N.C. 1977). *See also* Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964); *Federal Maritime Board v. Ibrandtsen*, 356 U.S. 481, 498-99 (1958); *United States v. Philadelphia National Bank*, 374 U.S. 321, 353 (1963).

CONCLUSION

The decision of the court of appeals should be reversed and this Court's opinion should make it clear that: (1) Section 504 does not give rise to a private right of action; and (2) Section 504 requires an otherwise qualified handicapped, plaintiff-employee to be an intended beneficiary of federal financial assistance and to have exhausted administrative remedies to have standing.

Respectfully submitted,

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APPENDIX A

Unsuccessful Attempts to Amend the Civil Rights Act of 1964 to Add Handicapps a Prohibited Ground of Discrimination

93d Congress (1973-74)

Bill	Sponsor
S. 1780	Pell
H.R. 1120	Roybal
H.R. 2685	Hicks
H.R. 10960	Tiernan
H.R. 11986	Hicks & 24 others
H.R. 11987	Hicks & 10 others
H.R. 12654	O'Brien
H.R. 12916	Moakley
H.R. 13199	Hicks & 21 others
H.R. 13200	Hicks & 18 others

94th Congress (1975-76)

Bill	Sponsor
S. 1811	Pell
S. 1787	Weicker
H.R. 1346	O'Brien
H.R. 1886	Matsunaga
H.R. 2515	Hicks
H.R. 3497	Roybal
H.R. 4824	Hicks & 23 others
H.R. 4625	Hicks & 24 others
H.R. 4626	Hicks & 6 others
H.R. 5016	Hicks & 8 others
H.R. 7061	Dodd
H.R. 7754	Hicks & 3 others
H.R. 7758	Lehman
H.R. 7946	Dodd & 4 others
H.R. 8028	Beard & 19 others
H.R. 8417	Beard & 5 others
H.R. 12591	Koch

95th Congress (1979-80)

Bill	Sponsor
S. 446	Harrison & 24 others
H.R. 393	Guyer
H.R. 609	O'Brien
H.R. 1326	Conte
H.R. 3345	Moakley
H.R. 5510	Guarni

97th Congress (1981-82)

Bill	Sponsor
H.R. 255	Guyer
H.R. 1919	Moakley

APPENDIX B

DEFINITION OF HANDICAPPED INDIVIDUALS

(7) (A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

(B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of [Sections 503 and 504], any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) as regarded as having such an impairment. For purposes of Sections [503] and [504] of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. § 706(7), *as amended* by the Rehabilitation Amendments of 1974, Pub. L. No. 93-5126, § 111(a), 88 Stat. 1619, and *as amended* by the Rehabilitation, Comprehensive Services and Disabilities Amendments of 1978, Pub. L. 95-602, § 122(a), 92 Stat. 2984.

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No. 82-862

In the Supreme Court of the United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

LEE ANN LESTRANGE DARRONE, AS ADMINISTRATRIX OF THE ESTATE OF THOMAS LESTRANGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a private right of action exists under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. (Supp. V) 794.

2. Whether Section 504 forbids employment discrimination in federally funded programs and activities only where a primary purpose of the federal funding is to promote employment.

3. Whether the handicapped applicant in this case was denied employment in a "program or activity receiving Federal financial assistance" (29 U.S.C. (Supp. V) 794).

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-862

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States has substantial responsibility for enforcing Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. (Supp. V) 794) in connection with federally assisted programs and activities.[1] The decision in this

[1] In 1976 the President directed the Secretary of Health, Education, and Welfare to "establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Exec. Order No. 11914, 41 Fed. Reg. 17871 (1976). The Secretary issued detailed regulations. See 45 C.F.R. Part 85 (1978). In 1980, the Secretary's responsibility was transferred to the Attorney General, Exec. Order No. 12250 (45 Fed. Reg. 72995 (1980)), and the regulations were "deemed to have been issued by the Attorney General" (*id.* at 72997; see 28 C.F.R. Part 41). The regulations require each federal agency to issue its own regula-

case will affect the validity of numerous regulations carrying out that federal responsibility. Petitioner asks this Court to hold that Section 504 permits employment discrimination unless a primary purpose of federal financial assistance is to provide employment. Regulations issued by at least 26 federal agencies have interpreted the Act otherwise—as prohibiting employment discrimination in all programs and activities receiving federal funds even if it is not a principal purpose of the funds to provide employment.[2] The United States has taken the same position in this Court[3] and the lower courts.[4] The United States has also participated as amicus curiae in other cases before this Court involving Section 504.[5]

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tions concerning handicap discrimination in the programs and activities financially assisted by that agency. 28 C.F.R. 41.4.

[2] 5 C.F.R. 900.706 (OPM); 7 C.F.R. 15b.11-15b.15 (DOA); 10 C.F.R. 4.122-4.125 (NRC); 10 C.F.R. 1040.66-1040.69 (DOE); 13 C.F.R. 113.3(c) (SBA); 14 C.F.R. 1251.200-1251.203 (NASA); 15 C.F.R. 8b.11-8b.15 (Dept. of Commerce); 18 C.F.R. 1307.5 (TVA); 22 C.F.R. 142.11-142.14 (Dept. of State); 22 C.F.R. 217.11-217.14 (AID); 48 Fed. Reg. 20652-20653 (1983) (to be codified at 24 C.F.R. 8.10-8.13) (HUD); 28 C.F.R. 42.510-42.513 (DOJ); 29 C.F.R. 32.12-32.17 (DOL); 31 C.F.R. 51.55 (Dept. of Treasury); 32 C.F.R. 56.8(b) (DOD); 34 C.F.R. 104.11-104.14 (Dept. of Ed.); 38 C.F.R. 18.411-18.414 (VA); 41 C.F.R. 101-8.305 to 101-8.308 (GSA); 43 C.F.R. 17.210-17.213 (DOI); 45 C.F.R. 84.11-84.14 (HHS); 45 C.F.R. 605.11-605.14 (NSF); 45 C.F.R. 1151.31-1151.34 (NEA); 45 C.F.R. 1170.21-1170.24 (NEH); 45 C.F.R. 1232.9-1232.12 (ACTION); 45 C.F.R. 1624.6 (Legal Services Corp.); 49 C.F.R. 27.31-27.37 (DOT).

[3] *Trageser* v. *Libbie Rehabilitation Center, Inc.*, cert. denied, 442 U.S. 947 (1979).

[4] *United States* v. *Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); *Trageser* v. *Libbie Rehabilitation Center, Inc.*, *supra*, 590 F.2d 87 (4th Cir. 1978); *Scanlon* v. *Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982), petition for cert. pending, No. 82-5812 (filed Nov. 22, 1982).

[5] *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979); *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981). We argued in *Davis* and *Camenisch* that Section 504 affords a private right of action, a proposition which petitioner challenges here.

SUMMARY OF ARGUMENT

I. The courts of appeals unanimously agree that Section 504 of the Rehabilitation Act (29 U.S.C. (Supp. V) 794) may be enforced through a private right of action. Its language is virtually identical to the language of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, which this Court has held created a private right of action. *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979) ("*Cannon*"). The history of Section 504 leads to the same conclusion. Like Title IX, it was based on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which was understood by the 1973 Congress to authorize a private cause of action. The year after the Rehabilitation Act was passed, Congress explicitly said that Section 504 would "permit a judicial remedy through a private action." S. Rep. No. 93-1297, 93d Cong., 2d Sess. 40 (1974). The purposes of Section 504 are also congruent with those of Title IX, which *Cannon* held were served by private actions. In fact, in 1978 Congress amended the Rehabilitation Act to authorize attorneys' fees for victorious private suitors. 29 U.S.C. (Supp. V) 794a(b).

II. Section 504 forbids employment discrimination in all federally assisted programs and activities, even if it is not a primary purpose of the federal assistance to promote employment.

A. The language of Section 504 supports this conclusion. It forbids discrimination against the handicapped in "*any* program or activity receiving Federal financial assistance" (emphasis added), not merely those where a primary purpose of the federal assistance is to promote employment. This Court held in *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 529-530 (1982) ("*North Haven*"), that the identical language of Title IX forbids employment discrimination without regard to the purpose for which federal funds were supplied. It would be particularly perverse to read Section 504 more narrowly,

since a basic goal of the entire Rehabilitation Act was to aid in the rehabilitation of the handicapped so that they could be employed and thus participate as useful and productive members in our society.

B. The legislative history of Section 504 shows that Congress intended broad coverage of employment discrimination. Senator Williams, the chairman of the Senate committee that reported the bill stated without qualification that it "prohibit[ed] * * * discrimination in employment in programs assisted with Federal funds * * *." 119 Cong. Rec. 24588 (1973).

C. In 1974 Congress amended the Rehabilitation Act to make clear that employment discrimination was not the *only* form of discrimination forbidden by Section 504. And in 1975 Congress reiterated that "qualified handicapped individuals who * * * are refused employment by recipients of assistance * * * are *fully* covered by the prohibition in section 504 of the Rehabilitation Act of 1973." S. Rep. No. 94-455, 94th Cong., 1st Sess. 54 (1975) (emphasis added).

D. The regulations adopted by the Department of Health, Education, and Welfare to enforce Section 504 forbid employment discrimination in all federally assisted programs and activities, without regard to the purpose of the federal assistance. The courts that interpreted Section 504 between its enactment in 1973 and the 1978 amendments to the Act also drew no distinctions based on the purpose of the federal funding.

E. Section 505(a)(2) (29 U.S.C. (Supp. V) 794a(a)(2)), added to the Rehabilitation Act in 1978, was not intended to restrict Section 504's coverage of employment discrimination. The language of Section 505(a)(2) suggests no such purpose. And Congress explicitly stated that the new section was simply intended to "codif[y]" existing HEW regulations "as a specific statutory requirement." S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978). In general, the 1978 amendments were "designed *to enhance* the ability of handicapped individuals to

assure compliance with the civil rights provisions of" Section 504 (S. Rep. No. 95-890, *supra*, at 18; emphasis added).

III. Because respondent may be entitled to recover back pay, the case is not moot. Congress expressly made back pay available to federal employees who file claims under Section 501 (29 U.S.C. 791). And the Senate committee that had reported the Rehabilitation Act stated in 1979 that the same remedy had always been open to Section 504 plaintiffs. Moreover, this Court suggested in *Guardians Ass'n* v. *Civil Service Comm'n*, No. 81-431 (July 1, 1983), that compensatory relief such as back pay could be available to private plaintiffs invoking Title VI against intentionally discriminatory conduct. That same relief should be available, by virtue of 29 U.S.C. 794a(a)(2), to plaintiffs under Section 504.

IV. The "program or activity" issue advanced by petitioner is not properly before this Court. The district court made no factual findings on the question; it granted summary judgment without reaching the issue. Nor was the issue considered by the court of appeals.

ARGUMENT

I. SECTION 504 MAY BE ENFORCED BY A PRIVATE RIGHT OF ACTION

Petitioner argues (Br. 32-40) that there is no private right of action to enforce Section 504. This contention has been rejected by every court of appeals that has considered the question.[6] It is inconsistent with the language

[6] See *Miener* v. *State of Missouri*, 673 F.2d 969, 973-975 (8th Cir.), cert. denied, No. 82-275 (Oct. 12, 1982); *Pushkin* v. *Regents of the University of Colorado*, 658 F.2d 1372, 1376-1380 (10th Cir. 1981); *Kling* v. *County of Los Angeles*, 633 F.2d 876, 878 (9th Cir. 1980); *Camenisch* v. *University of Texas*, 616 F.2d 127, 131 (5th Cir. 1980), vacated on other grounds, 451 U.S. 390 (1981); *NAACP* v. *Medical Center*, 599 F.2d 1247, 1258-1259 (3d Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979);

and history of the Rehabilitation Act. It also cannot be squared with this Court's decision in *Cannon*, *supra*, which held that a virtually identical provision in Title IX of the Education Amendments of 1972 (20 U.S.C. 1681(a)) created a private right of action.

In determining whether Congress intended to create a private right of action, "the threshold question * * * is answered by looking to the language of the statute itself." *Cannon*, *supra*, 441 U.S. at 689. Section 504 provides that (29 U.S.C. (Supp. V) 794)

> No otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

In *Cannon* this Court held that Congress's use of indistinguishable language a year earlier in Title IX was intended to create a private right of action.[7] The Court pointed out that, with the exception of one "virtually unique situation," "this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case." *Cannon*, *supra*,

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Kampmeier v. *Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977).

[7] Section 901(a) states (20 U.S.C. 1681(a)):

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

Both Section 504 and Section 901 are modeled after Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d. See *Community Television of Southern California* v. *Gottfried*, No. 81-298 (Feb. 22, 1983), slip op. 11; *North Haven Board of Education* v. *Bell*, *supra*, 456 U.S. at 529.

441 U.S. at 690-691 n.13. The language of Section 504 confers a right on respondent[8] in precisely the same terms as Section 901 conferred a right on Cannon.[9]

The history of Section 504 also "rather plainly indicates that Congress intended to create such a remedy." *Cannon*, *supra*, 441 U.S. at 694. In *Cannon* this Court concluded that "Congress intended to create Title IX remedies comparable to those available under Title VI [42 U.S.C. 2000d] and * * * it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination" (441 U.S. at 703). Section 504 was enacted the year after Title IX, and was

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[8] Petitioner concedes that any private right of action under Section 504 survives Thomas LeStrange's death (Br. 31 n.23).

[9] Petitioner states at several points (Br. 4, 15, 36) that the failure to provide explicit remedies in the original Rehabilitation Act shows that Congress intended in Section 504 only to make a statement of policy, not to create enforceable rights. This contention ignores the language of Section 504, which, like Titles VI and IX, speaks in mandatory rather than hortatory terms: "No * * * individual * * * shall * * * be excluded * * *, be denied * * * *, or be subjected to discrimination * * *." Such "right- or duty-creating language" has been found to be "the most accurate indicator of the propriety of implication of a cause of action." *Cannon*, *supra*, 441 U.S. at 690 n.13. Section 504's language is markedly dissimilar to that found in congressional statements of policy. Cf. *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 19 (1981) (Congress made "findings" concerning rights).

Petitioner also emphasizes statements in several committee reports that " 'proclaim a policy of nondiscrimination' " (Br. 15, quoting S. Rep. No. 92-1135, 92d Cong., 2d Sess. 49 (1972)). But those same reports state that Section 504 "prohibits discrimination" and imposes a "requirement of * * * nondiscrimination * * *." *Id.* at 6, 9, 77; S. Rep. No. 93-318, 93d Cong., 1st Sess. 70 (1973). See also S. Rep. No. 93-48, 93d Cong., 1st Sess. 53, 80 (1973). It is highly unlikely that Congress would have borrowed the language of Title VI, which the courts had already ruled created a private right of action (see cases cited in *Cannon*, *supra*, 441 U.S. at 696-697 n.21), if it had meant to confine itself to a declaration of policy.

also patterned after Title VI.[10] When the Rehabilitation Act was amended in 1974, the Senate report noted that the

> approach to implementation of section 504, which closely follows the models of [Title VI and Title IX], would * * * permit a judicial remedy through a private action.

S. Rep. No. 93-1297, *supra*, at 40.[11] See also S. Rep. No. 96-316, 96th Cong., 1st Sess. 12-13 (1979).

The Court stated in *Cannon* that when a private right of action "is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute" (441 U.S. at 703). Like Title IX and Title VI, Section 504 has two related purposes: prohibiting the use of federal funds to support discrimination, and providing individual citizens effective protection against discrimination. The first purpose is served by terminating federal financial aid (see *Community Television of Southern California* v. *Gottfried*, No. 81-298 (Feb. 22, 1983), slip op. 10-11 (*"Gottfried"*)). But that remedy is a severe and inappropriate cure for isolated violations. "The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to— the orderly enforcement of the statute" (*Cannon*, *supra*, 441 U.S. at 705-706). The Department of Justice, charged with the responsibility for coordinating the enforcement of Section 504 (see note 1, *supra*), "perceives no incon-

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[10] See note 7, *supra*. In fact, the provision that ultimately became Section 504 was written in 1972, by the same Congress that enacted Title IX. See pages 13-15, *infra*.

[11] Petitioner suggests (Br. 36-37) that the reference to "a judicial remedy through a private action" in the 1974 Senate report concerns "the right to judicial review of an agency's decision to terminate or continue the federal funding of a program or activity * * *." If so, the mention of a private right of action is redundant; the same sentence in the report also states that there is a "right to review" of administrative decisions. S. Rep. No. 92-1297, *supra*, at 40.

sistency between the private remedy and the public remedy" (*Cannon, supra*, 441 U.S. at 706). And the "history of federal-court recognition of a cause of action" (see note 6, *supra*) is a "further indication of the consistency of [Section 504's] purposes and the existence of a private remedy" (*Cannon, supra*, 441 U.S. at 706 n.40).[12]

The 1978 amendments to the Rehabilitation Act, which according to petitioner (Br. 34-38) exclude private enforcement,[13] in fact afford persuasive evidence of Congress's belief that a private remedy is essential to accomplish the statutory purposes. Section 505(b) (29 U.S.C. (Supp. V) 794a(b)) states that

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing

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[12] Petitioner argues (Br. 39-40) that the existence of a private right of action would interfere, in some unspecified way, with administrative enforcement of Section 504. But petitioner overlooks the fact that this Court "has *never* withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute" (*Cannon, supra*, 441 U.S. at 707 n.41; emphasis added). Like the procedures under Title IX (see 441 U.S. at 707 n.41), the administrative enforcement mechanism under Section 504 provides no role for the complainant in the investigation and subsequent proceedings, and offers no assurance of relief for the complainant even if a violation is found. See *Pushkin* v. *Regents of the University of Colorado, supra*, 658 F.2d at 1381-1382; *Camenisch* v. *University of Texas, supra*, 616 F.2d at 132, 135.

[13] Petitioner argues (Br. 34-35) that Section 505(a)(2) (29 U.S.C. (Supp. V) 794a(a)(2)) was intended to limit "whatever implied enforcement rights previously existed" (Br. 37). That Section states that "[t]he remedies, procedures, and rights set forth in title VI * * * shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * *." Petitioner claims that because no private right of action is explicitly "set forth" in Title VI, the remedies now open to Section 504 plaintiffs are actually less generous than those available to Title VI victims. There is no hint in the 1978 legislative history that Section 505(a)(2) was enacted with such a retrograde purpose.

party, other than the United States, a reasonable attorney's fee as part of the costs.

The history of this provision states unequivocally that it was intended to apply to private plaintiffs. See, *e.g.*, S. Rep. No. 95-890, *supra*, at 19; H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 21 (1978); 124 Cong. Rec. 30346-30347 (1978) (remarks of Sen. Cranston). Cf. *Cannon*, *supra*, 441 U.S. at 685-686, 699-701 (similar attorneys' fees provisions show private enforceability of Titles VI and IX).[14]

II. SECTION 504 FORBIDS EMPLOYMENT DISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS AND ACTIVITIES EVEN IF IT IS NOT A PRIMARY PURPOSE OF THE FEDERAL ASSISTANCE TO PROMOTE EMPLOYMENT

The language of Section 504 prohibits discrimination in "*any* program or activity receiving Federal financial assistance" (emphasis added). Nothing in the history of the Rehabilitation Act of 1973 provides a basis for believing that this comprehensive wording was implicitly confined—in the case of employment—to programs and ac-

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[14] The fourth factor mentioned in *Cannon*—this Court's hesitance to imply a federal remedy in areas basically of concern to the states—presents no more difficulty here than it did there, since it is again "the expenditure of federal funds that provides the justification for this particular statutory prohibition" (441 U.S. at 708-709).

This Court's recent decision in *Guardians Ass'n* v. *Civil Service Comm'n*, No. 81-431 (July 1, 1983), does nothing to undermine the conclusion that a private right of action is available to enforce Section 504. A majority of the Court there concluded "that Title VI * * * could be enforced in a private action against a state or local agency receiving federal funds" (slip op. 12 (opinion of White, J.), slip op. 10-13 (opinion of Marshall, J.), slip op. 1-2 (opinion of Stevens, J.)). It is true, however, that in this case, unlike in *Guardians* (see slip op. 12 (opinion of White, J.)), there is no viable claim under 42 U.S.C. 1983 to provide an alternative basis for such a private action. The district court dismissed LeStrange's Section 1983 claim (Pet. App. A54-A57), and LeStrange did not appeal the dismissal.

tivities receiving federal funds for the purpose of promoting employment. Indeed, when the Rehabilitation Act was amended in 1974, Congress found it important to emphasize that protection against employment discrimination was not the *only* purpose of Section 504. Contemporary administrative and judicial construction mirrored Congress's understanding that Section 504 affords broad protection against employment discrimination.

Petitioner nonetheless contends (Br. 4-24) that in Section 505(a)(2) (29 U.S.C. (Supp. V) 794a(a)(2))—added to the Rehabilitation Act five years after its passage—Congress authorized employment discrimination by federally funded programs unless the primary purpose of federal funding was to promote employment. The language of Section 505(a)(2) does not support that construction. Nor did Congress even suggest, when it passed the 1978 amendments, that it intended to truncate so severely the rights that the 1973 Act had conferred on handicapped employees.[15]

A. The Language Of Section 504 Covers Employment Discrimination Comprehensively In All Federally Assisted Programs And Activities

Before we address the effect of the 1978 amendments, on which petitioner relies so heavily, it is important to

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[15] The courts of appeals are split on this issue. The court of appeals here and the Eleventh Circuit (*Jones* v. *MARTA*, 681 F.2d 1376 (11th Cir. 1982), petition for cert. pending, No. 82-1159 (filed Jan. 11, 1983)), have held that Section 504 prohibits employment discrimination regardless of the purpose of the federal assistance. The Second, Fourth, Eighth and Ninth Circuits have adopted the narrower view espoused by petitioner. *United States* v. *Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); *Trageser* v. *Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979); *Carmi* v. *Metropolitan St. Louis Sewer District*, 620 F.2d 672 (8th Cir.), cert. denied, 449 U.S. 892 (1980); *Scanlon* v. *Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982), petition for cert. pending, No. 82-5812 (filed Nov. 22, 1982); *Meyerson* v. *Arizona*, No. 81-5996 (9th Cir. May 9, 1983). See also *Ward* v. *MBTA*, 550 F. Supp. 1310 (1982), appeal pending, No. 82-1918 (1st Cir.).

examine the coverage of the Rehabilitation Act during the first five years of its existence. Petitioner does not dispute that the language of Section 504 applies to handicapped employees. That concession is not surprising, given the identity among Section 504, Section 901(a) of Title IX (20 U.S.C. 1681(a)), and Section 601 of Title VI (42 U.S.C. 2000d). See note 7, *supra*. Just as "Section 901(a)'s broad directive that 'no person' may be discriminated against on the basis of gender appears, on its face, to include employees as well as students" (*North Haven*, *supra*, 456 U.S. at 520), so Section 504's identical command that no individual may be discriminated against by reason of his handicap includes employees as well as other handicapped persons.

But petitioner argues that Section 504 covers employment in only *some* federally assisted programs and activities—those where a primary purpose of federal aid is to promote employment. That contention is difficult to square with the express terms of the 1973 Act. It is clear from the face of Section 504 that if employment discrimination is prohibited, it is comprehensively prohibited in "*any* program or activity receiving Federal financial assistance * * *."

In fact, just as the existence of a private right of action was controlled by *Cannon*, so this question—the scope of the federal prohibition against employment discrimination—is controlled by *North Haven*, another Title IX case. Petitioners in *North Haven* argued (as petitioner does here) that Title IX was based on Title VI, and that Title VI—as Section 604 makes clear—does not cover employment discrimination "except where a primary objective of the Federal financial assistance is to provide employment" (42 U.S. 2000d-3).[16] This Court answered (456 U.S. at 529-530):

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[16] Section 604 (42 U.S.C. 2000d-3) provides in full:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any em-

> The meaning and applicability of Title VI are useful guides in construing Title IX * * * only to the extent that the language and history of Title IX do not suggest a contrary interpretation. * * * If Congress had intended that Title IX have the same reach as Title VI, * * * it would have enacted counterparts to both § 601 and § 604. For although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them.

Like Title IX, the Rehabilitation Act of 1973 included no counterpart to Section 604. Yet "[i]f Congress had intended that [Section 504] have the same reach as Title VI" it would not have stopped where it did; for Section 504 "alone [is] not * * * adequate to exclude employees from the statute's coverage" in the way petitioner suggests. *North Haven, supra*, 456 U.S. at 530.[17]

The structure and focus of the Rehabilitation Act as a whole support the conclusion that Section 504 was meant to forbid employment discrimination in "any program or activity." The Act was designed to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment" (29 U.S.C. 701(8)). The very term "handicapped" is defined in the 1973 Act in terms of an individual's employability.[18] Title I of the

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ployer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

[17] Petitioner correctly points out (Br. 7-8) that in passing Title IX Congress expressly rejected a provision similar to Section 604; no similar provision was even proposed for inclusion in the Rehabilitation Act of 1973. But it is hardly surprising that Congress —having rejected Section 604 in 1972—was unwilling to go through the motions again in 1973.

[18] Section 7(6) of the Rehabilitation Act (29 U.S.C. (Supp. III 1970 ed.) 706(6)) defined "handicapped individual" as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to em-

Act authorized grants to aid the handicapped "so that such individuals may prepare for and engage in gainful employment" (29 U.S.C. 720(a)). And Title V not only forbids discrimination by recipients of federal funds (Section 504), but also directs federal agencies and federal contractors to undertake affirmative action to hire and promote the handicapped (Sections 501, 503, 29 U.S.C. 791, 793).

It would be remarkable if, in an act whose very focus was on promoting employment opportunities for handicapped individuals, Congress had limited its ban on employment discrimination in the narrow fashion suggested by petitioner. It is far more faithful to the intent of Congress, "'if we are to give [Section 504] the scope that its origins dictate, [to] accord it a sweep as broad as its language.'" *North Haven, supra*, 456 U.S. at 521, quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966).

B. The Legislative History Of The Rehabilitation Act Of 1973 Shows Congress's Intent To Cover Employment Discrimination In All Federally Assisted Programs And Activities

Section 504 originated in the 92d Congress, when numerous proposals were made to amend Titles VI and VII of the Civil Rights Act of 1964 (42 U.S.C. (& Supp. V) 2000d, 2000e) by including the handicapped among the protected classes.[19] Had those measures been enacted,

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ployment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to titles I and III of this Act."

[19] Bills introduced in the 92d Congress to amend Title VI included: H.R. 12154, 92d Cong., 1st Sess. (1971) (Rep. Vanik); H.R. 12737, 92d Cong., 2d Sess. (1972) (Rep. Abzug); H.R. 13009, 92d Cong., 2d Sess. (1972) (Rep. Vanik et al.); H.R. 13297, 92d Cong., 2d Sess. (1972) (Rep. Roybal); H.R. 13306, 92d Cong., 2d Sess. (1972) (Rep. Vanik et al.); H.R. 13947, 92d Cong., 2d Sess. (1972) (Rep. Vanik et al.); H.R. 14117, 92d Cong., 2d Sess. (1972) (Rep. Halpern); H.R. 14517, 92d Cong., 2d Sess. (1972) (Rep. Dow); H.R. 15012, 92d Cong., 2d Sess. (1972) (Rep. Steele);

they would have forbidden employment discrimination by all employers of 15 or more, without regard to the receipt (or purpose) of federal financial assistance. See 42 U.S.C. 2000e(b), 2000e-2(a)(1); H.R. 14033, 92d Cong., 2d Sess. § 1 (1972). Congress decided, however, not to extend Title VII to the handicapped. Instead Congress chose to include in the Rehabilitation Act the language of Title VI's prohibition against discrimination (Section 601)—but not Title VI's employment limitation (Section 604). S. 3987, 92d Cong., 2d Sess. § 604 (1972) (the original version of Section 504). Several of the sponsors of the earlier measures expressed their approval of the alternative chosen. Senator Humphrey, for example, stated (118 Cong. Rec. 32310 (1972)):

> I am deeply gratified at the inclusion of [Section 504 and other] provisions, which carry through the intent of original bills which I introduced * * * earlier this year, S. 3044 and S. 3458, to amend, respectively, Titles VI and VII of the Civil Rights Act of 1964, to guarantee the right of persons with a mental or physical handicap to participate in programs receiving Federal assistance, and to make discrimination in employment because of these handicaps, and in the absence of a bona fide occupational qualification, an unlawful employment practice.

H.R. 15371, 92d Cong., 2d Sess. (1972) (Rep. Harrington); S. 3044, 92d Cong., 2d Sess. (1972) (Sen. Humphrey et al.).

Bills introduced in the 92d Congress to amend Title VII included: H.R. 10962, 92d Cong., 1st Sess. (1971) (Rep. Hicks); H.R. 10996, 92d Cong., 1st Sess. (1971) (Rep. Hicks); H.R. 14033, 92d Cong., 2d Sess. (1972) (Rep. Vanik); H.R. 15678, 92d Cong., 2d Sess. (1972) (Rep. Ashley); S. 3458, 92d Cong., 2d Sess. (1972) (Sen. Humphrey et al.).

Similar legislation to include the handicapped within the protection of Title VII was introduced in the 93d Congress. See, *e.g.*, H.R. 2685, 93d Cong., 1st Sess. (1973) (Rep. Hicks); H.R. 10960, 93d Cong., 1st Sess. (1973) (Rep. Tiernan); H.R. 11986, 93d Cong., 1st Sess. (1973) (Rep. Hicks et al.); H.R. 11987, 93d Cong., 1st Sess. (1973) (Rep. Hicks et al.); S. 1780, 93d Cong., 1st Sess. (1973) (Sen. Pell).

In the same vein Congressman Vanik, who had introduced similar bills (see note 19, *supra*), later stated (119 Cong. Rec. 18137 (1973)):

> [I]t pleases me that the adoption of my proposals to protect the rights of handicapped people in employment, and in the issuance of Federal grants, have been incorporated into this compromise bill.

When S. 3987, *supra*, was introduced, Senator Randolph stated that it would "prohibit[] *any kind* of discrimination against handicapped individuals with respect to *any* program receiving Federal financial assistance." 118 Cong. Rec. 30681 (1972) (emphasis added). The proposal proved uncontroversial. What discussion there was did not go beyond summaries of its language. See, *e.g.*, 118 Cong. Rec. 30683 (1972) (remarks of Sen. Cranston). Though the measure passed by the House did not include a provision similar to Section 504, the House receded in conference without comment. H.R. Rep. No. 92-1581, 92d Cong., 2d Sess. 78 (1972). President Nixon pocket vetoed the bill because it would have authorized funding in excess of budget, and would have created "numerous committees and independent commissions which are unnecessary * * *." 118 Cong. Rec. 37203-37204 (1972).

Similar measures were promptly reintroduced in both houses. S. 7, 93d Cong., 1st Sess. (1973); H.R. 17, 93d Cong., 1st Sess. (1973). In the course of the debate on S. 7 Senator Cranston—who chaired the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare while the bill was being considered—said in the course of defending the various commissions called for by the bill (119 Cong. Rec. 5882 (1973)):

> Such problems as unfounded discrimination in employment and * * * difficulties of access to places of work * * * were voiced repeatedly to the committee. * * * [D]iscrimination in placement, hiring and advancement continue[s] to limit the vocational rehabilitation program's ability to effect successful rehabilitations.
>
> * * * * *

> The expenditure of money on vocational rehabilitation programs is not well spent if we do not at the same time take meaningful steps to * * * provide substantial accomplishments in employment for handicapped individuals.

Senator Javits, a co-sponsor of the Act and a member of the subcommittee, described the bill generally as "provid[ing] new emphasis on * * * opportunities for employment of the handicapped" (*id.* at 5887). President Nixon again vetoed the measure (*id.* at 9597).

Again similar bills were introduced in both houses. H.R. 8070, 93d Cong., 1st Sess. (1973); S. 1875, 93d Cong., 1st Sess. (1973). The Senate Report on S. 1875, S. Rep. No. 93-318, 93d Cong., 1st Sess. 4 (1973), stated that hearings on the legislation had shown a "lack of action in areas related to rehabilitation which limit a handicapped individual's ability to function in society, e.g., employment discrimination * * *." The same theme was stressed by Senator Taft during floor debate on the bill (119 Cong. Rec. 24587 (1973)):

> Too many handicapped Americans * * * lack jobs, and too many are underemployed * * *.
>
> [I]f we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all—discrimination.

Perhaps the most direct observation on the intended scope of Section 504 was offered by Senator Williams, the chairman of the Committee on Labor and Public Welfare. He stressed that the modified bill, unlike the two that had been vetoed, had the support of the administration. The bill nonetheless retained features from the earlier measures that the Committee, in the course of its hearings, had found necessary (119 Cong. Rec. 24587-24588 (1973); emphasis added):

> The committee also found it necessary to * * * grapple with problems, which while not related solely

> to rehabilitation, pose serious problems for handicapped individuals in becoming employed [and] staying employed * * *. In this respect the committee paid special attention to the problems of employment, discrimination, [and so on.]
>
> Mr. President, S. 1875 retains many of the provisions contained in the previous legislation. These include:
>
> * * * * *
>
> Second, * * * *prohibitions against discrimination in employment in programs assisted with Federal funds* * * *.

It is true that Congress's discussion of Section 504 does not explicitly reject the notion that employment discrimination is forbidden only where a primary purpose of the federal assistance is to promote employment. But it would be surprising if that issue had arisen, since the language of the section suggests no such restriction. More important, the bill contained no counterpart to Section 604 of Title VI, and no hint that any parallel restriction was contemplated. What the legislative history does show, on the other hand, is an unqualified concern that employment discrimination could cancel out whatever advances the Act made in rehabilitation of the handicapped, and a corresponding purpose to "prohibit[] * * * discrimination in employment in programs assisted with Federal funds" (119 Cong. Rec. 24588 (1973)).

C. The Legislative History Of The 1974 Amendments Reinforces The View That Section 504 Was Originally Intended To Cover Employment Discrimination In All Federally Assisted Programs And Activities

"Although postenactment developments cannot be accorded 'the weight of contemporary legislative history' " (*North Haven*, *supra*, 456 U.S. at 535, quoting *Cannon*, *supra*, 441 U.S. at 687 n.7), certain "subsequent events * * * lend credence to the * * * interpretation" given Section 504 by the agencies charged with implementing it (*ibid.*). See note 2, *supra*. In 1974 the Rehabilitation

Act was amended by the same Congress that had enacted it a year earlier.[20] Section 504 itself was not altered. But the definition of "handicapped" was changed to make clear that employment discrimination was not the *only* form of discrimination covered by Section 504.[21] The Senate committee report[22] explained (S. Rep. No. 93-1297, *supra*, at 37 (emphasis added)):

> Section 7(6) of the Rehabilitation Act of 1973 defines "handicapped individual." That definition has proven to be troublesome in its application to provisions of the Act such as *sections 503 and 504 because of its orientation toward employment* and its relation to vocational rehabilitation services. It was clearly the intent of Congress in adopting section 503 (affirmative action) and section 504 (nondiscrimination) that the term "handicapped individual" in those sections was *not to be narrowly limited to employment (in the case of section 504)* * * *.

Thus, far from suggesting that Section 504's employment coverage was limited, Congress in 1974 found it neces-

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[20] Pub. L. No. 93-516, 88 Stat. 1617. The 1974 amendments expanded the focus on employment of the handicapped. In addition to increasing the authorization for the original rehabilitation program, the amendments strengthened the federal blind vendor program (Title II, 88 Stat. 1622), and established the White House Conference on Handicapped Individuals (Title III, 88 Stat. 1631) to consider, among other things, recommendations "assuring individuals with handicaps of equal opportunity with others to engage in gainful employment" (88 Stat. 1632).

[21] The original definition of "handicapped individual" (see note 18, *supra*) was amended to read: "For the purposes of subchapters IV and V of this Act, such term means any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." 29 U.S.C. 706(6).

[22] This Court relied on S. Rep. No. 93-1297 in *Gottfried*, *supra*, slip op. 11, as evidence of Congress's original understanding of Section 504. See also *Glidden Company* v. *Zdanok*, 370 U.S. 530, 541-542 (1962) (plurality opinion); *FHA* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

sary to dispel the impression that it had nothing else on its mind.[23]

The Senate report went on to say (S. Rep. No. 93-1297, *supra*, at 39):

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 * * *, and section 901 of the Education Amendments of 1972 * * *. The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap.

There is no reference here to Section 604, and no suggestion of any limitation on the "broad government policy" against discrimination.[24]

D. Administrative Regulations And Judicial Opinions Construed Section 504 To Prohibit Employment Discrimination Regardless Of The Purpose Of The Federal Assistance

In passing the 1974 amendments to the Rehabilitation Act, Congress expressed its desire that an administrative program to enforce the Act—like those adopted for Titles VI and IX—be created by regulation. S. Rep. No. 93-

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[23] See also S. Rep. No. 93-1297, *supra*, at 63-64 (the new definition would provide sufficient latitude "for the nondiscrimination programs carried out under sections 501, 503, and 504 with respect to the employment of handicapped individuals in the Federal Government, under Federal contracts and subcontracts, pursuant to the provision of Federal financial assistance, and in the State rehabilitation agencies and local facilities, and the participation of handicapped individuals in any program or activity receiving Federal financial assistance").

[24] See also S. Rep. No. 94-455, *supra*, at 54 ("It is clear that qualified handicapped individuals who, because of their handicap, are refused employment by recipients of assistance under the [Education for All Handicapped Children] Act are fully covered by the prohibition in section 504 of the Rehabilitation Act of 1973."); 122 Cong. Rec. 3257 (1976) (remarks of Rep. Dodd).

1297, *supra*, at 39-40. See also 120 Cong. Rec. 15743 (1974) (remarks of Rep. Vanik). The President designated the Department of Health, Education, and Welfare ("HEW") as the agency responsible for coordinating Section 504 enforcement. Exec. Order No. 11914, *supra* note 1. HEW therefore proposed (41 Fed. Reg. 29548 (1976)) and thereafter promulgated (42 Fed. Reg. 22676 (1977)) departmental regulations to govern its own recipients' activities. HEW noted that Section 504 differed "from Title VI in the extent to which it applies to employment practices" (41 Fed. Reg. 29548). The departmental regulations interpreted Section 504 to prohibit all employment discrimination regardless of the purpose of federal financial assistance. (42 Fed. Reg. 22680, 22688.) HEW later promulgated its coordinating regulations pursuant to Exec. Order No. 11914; these also interpreted Section 504 to forbid employment discrimination in all federally assisted programs and activities, without regard to the purpose of the federal assistance. 43 Fed. Reg. 2132, 2138 (1978).[25]

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[25] Other federal agencies providing financial assistance thereafter issued their own regulations patterned on the HEW coordinating regulations. See note 2, *supra*. Among them is the Department of Transportation, from whom petitioner receives financial assistance (Pet. Br. 22 n.18). HEW's coordinating and enforcement authority for Section 504 was transferred to the Department of Justice in 1980. See note 1, *supra*. HEW's regulations remain in effect pending the adoption of new regulations by the Department of Justice. 46 Fed. Reg. 40686-40687 (1981).

Petitioner contends (Br. 22)—relying on this Court's decision in *Southeastern Community College* v. *Davis*, *supra*, 442 U.S. at 411 n.11—that HEW's regulations are entitled to little weight because they were not promulgated until three years after passage of the Rehabilitation Act. *Davis* held that HEW's regulations, if they in fact imposed the kind of affirmative action requirement urged by Davis (a matter about which this Court expressed some doubt, 442 U.S. at 409-410), misunderstood Congress's intent in that regard (*id.* at 411-412). That is a far cry from holding that the regulations depart from Congress's intent respecting the basic issue of coverage at stake here. Nor is it proper to conclude that the regulations are entitled to little deference in general. This

The early judicial decisions interpreting Section 504 also entertained claims asserting employment discrimination without inquiring into the purpose of federal financial assistance.[26]

It is against this background of statutory language and structure, legislative history, administrative regulation, and judicial interpretation, that Section 505(a)(2) was enacted in 1978.

E. Section 505(a)(2) Was Not Designed to Narrow Section 504's Prohibition Against Employment Discrimination

When the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments were passed in 1978, Pub. L. No. 95-602, 92 Stat. 2955, it was well established that Section 504 protected the handicapped against employment discrimination whenever there existed federal financial assistance, without regard to its purpose. Neither the language of Section 505(a)(2) (29 U.S.C. (Supp. V) 794a(a)(2)) nor its history suggests that Congress intended in 1978 radically to reverse this policy against employment discrimination.

Petitioner's arguments (Br. 5-10) transform Section 505(a)(2) into a remarkable Trojan horse. According to petitioner, that Section introduces into the Rehabilitation Act all of Title VI, including Section 604 (42 U.S.C. 2000d-3), which forbids federal agencies to cut off funding or otherwise redress racial discrimination "except

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Court relied on them to support its interpretation of the term "otherwise qualified" in *Davis*, 442 U.S. at 406, and acknowledged in *Gottfried* (slip op. 11 & n.15) that HEW had responsibility for coordination and enforcement of Section 504.

[26] See *Gurmankin* v. *Costanzo*, 411 F.Supp. 982, 989 (E.D. Pa. 1976), aff'd on other grounds, 556 F.2d 184 (3d Cir. 1977); *Whitaker* v. *Board of Higher Education*, 461 F.Supp. 99, 106-109 (E.D.N.Y. 1978); *Davis* v. *Bucher*, 451 F.Supp. 791 (E.D. Pa. 1978); *Duran* v. *City of Tampa*, 430 F.Supp. 75 (M.D. Fla. 1977), 451 F.Supp. 954 (M.D. Fla. 1978); *Drennon* v. *Philadelphia General Hospital*, 428 F.Supp. 809 (E.D. Pa. 1977).

where a primary objective of the Federal financial assistance is to provide employment."

Such a conclusion is certainly not compelled by the language of Section 505(a)(2), which says:

> The remedies, procedures, and rights set forth in title VI * * * shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance * * *.

Unlike Section 601 (42 U.S.C. 2000d) (which Congress understood to create a private "right" of action), Section 602 (42 U.S.C. 2000d-1) (which directs the creation of remedies and procedures to enforce Title VI rights), and Section 603 (42 U.S.C. 2000d-2) (which authorizes judicial review of funds cutoffs), Section 604 "set[s] forth" no "remedies, procedures, [or] rights." It is a substantive limitation on the scope of Title VI,[27] limiting the protection it affords to employees. Nor does Section 604 make anything at all "available" to anyone; it would therefore seem peculiar to speak of making its limitation "available" to persons aggrieved under the Rehabilitation Act. Section 505(a)(2) is plainly designed to make "available" to the handicapped options that may be selected, not to create an absolute limitation on the reach of the statute. Finally, Section 505(a)(2) says

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[27] It has been suggested that Section 604, which is addressed to action by "any department or agency" (42 U.S.C. 2000d-3), does not limit the right of private plaintiffs to seek relief for employment discrimination. See Comment, *Employment Discrimination Against the Handicapped: Can* Trageser[] *Repeal the Private Right of Action?*, 54 N.Y.U. L. Rev. 1173, 1185-1191 (1979). But see *Feliciano* v. *Romney*, 363 F.Supp. 656 (S.D.N.Y. 1973); *Otero* v. *Mesa County Valley School Dist. No. 51*, 470 F.Supp. 326 (D. Colo. 1979), aff'd, 628 F.2d 1271 (10th Cir. 1980). If so, it would not limit respondent's right to proceed in this case even if it were incorporated in the Rehabilitation Act by Section 505(a)(2). While we have serious doubt that such an interpretation is consistent with the purpose of Section 604, the Court need not reach that issue in this case, because it is sufficiently clear that Congress did not intend to make Section 604 applicable to the Rehabilitation Act.

that Title VI's remedies, rights, and procedures are open to "*any* person aggrieved by *any* act • • • by *any* recipient of Federal assistance"—terms hardly consistent with employment coverage that applies only to *some* recipients.

The legislative history of the 1978 amendments shows that Congress's purpose was to incorporate Title VI's enforcement procedures, not to restrict Section 504's substantive coverage. In 1974 Congress noted that Section 504 was patterned after Titles VI and IX, and was intended to be enforced through regulations and procedures like the ones adopted under those titles. S. Rep. No. 93-1297, *supra*, at 39-40. As examples of what it meant, Congress cited (*id.* at 40) "a judicial remedy through a private action" (cf. Section 601, 42 U.S.C. 2000d); agency regulations providing for investigation and review of funds recipients and for enforcement through voluntary means (or, where necessary, funds cutoff) (cf. Section 602, 42 U.S.C. 2000d-1); and administrative due process, including a "right to review" (cf. Section 603, 42 U.S.C. 2000d-2). HEW thereafter proposed its departmental and coordinating regulations, which it "la[id] • • • before the Congress so that it [could] provide whatever clarification [was] appropriate." [28] Those regulations—though conforming in other respects to the Title VI and Title IX procedures—prohibited all employment discrimination regardless of the purposes of federal financial assistance. See page 20, *supra*.

Section 505(a)(2) originated in the Senate, and the committee report on the bill, referring to that background, stated:

> It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures,

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[28] *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 73 (1977); see *id.* at 76.

> remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement.

S. Rep. No. 95-890, *supra*, at 19. It is unlikely that, as petitioner argues (Br. 21), Congress simply "overlooked" HEW's coverage of all employment discrimination.[29] A more obvious explanation for the committee's statement is simply that the phrase "procedures, remedies, and rights" did not refer to substantive limitations like that in Section 604 of Title VI.

That Congress chose not to incorporate Section 604 into the Rehabilitation Act should hardly occasion surprise. After all, Title VII's employment remedies are available to supplement funds cutoffs under Title VI (see page 14, *supra*). But Title VII remedies are not generally available to handicapped employees. Moreover, the overriding purpose of the 1978 amendments was to expand, not contract, the rights of the handicapped. Thus, Section 505(a)(1) (29 U.S.C. (Supp. V) 794a(a)(1)) made Title VII remedies available to handicapped *federal* employees, who had theretofore had no private right of action. And Section 505(b) (29 U.S.C. (Supp. V) 794a (b)) for the first time allowed attorneys' fees to "assist handicapped individuals in securing the legal protection guaranteed them under title V of the [Rehabilitation A]ct." H.R. Rep. No. 95-1149, *supra*, at 21.[30] It is unlikely that Congress would have sandwiched between those two provisions a section whose unspoken purpose

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[29] When Congress disagreed with other provisions in the HEW regulations, it took steps to change them. See Comment, *supra*, 54 N.Y.U. L. Rev. at 1192 n.96.

[30] The amendments also added a new Title VI to the Rehabilitation Act to improve employment opportunities for handicapped individuals with poor employment prospects (29 U.S.C. (Supp. V) 795-795i), and a new Title VII to provide services and instruction to those lacking the potential for employment (29 U.S.C. (Supp. V) 796-796i).

was to eliminate a large part of the protection that Section 504 gave private employees. Rather, as the Senate report stated, Sections 505(a) and (b) were "designed *to enhance* the ability of handicapped individuals to assure compliance with the civil rights provisions of title V * * *." S. Rep. No. 95-890, *supra*, at 18 (emphasis added).[31]

III. THE CASE IS NOT MOOT, SINCE RESPONDENT MAY BE ENTITLED TO RECOVER BACK PAY

The original complaint in this action sought injunctive relief, back pay, punitive damages, and costs and attorney's fees (J.A. A7, A9). LeStrange having died, the claim for injunctive relief is moot (Pet. Br. 31). Contrary to petitioner's contention (*id.* at 40-47), however, respondent may be entitled to seek back pay for a violation of Section 504. The case itself is thus not moot. *Powell* v. *McCormack*, 395 U.S. 486, 496-500 (1969); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 8-9 (1978).[32]

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[31] Those who considered the matter of employment coverage while the 1978 amendments were being debated uniformly assumed that it was not limited by the purpose of the federal assistance. See, *e.g.*, 124 Cong. Rec. 30346 (1978) (remarks of Sen. Cranston); 124 Cong. Rec. 30324 (1978) (remarks of Sen. Hathaway); *id.* at 30323 (remarks of Sen. Williams), 30577-30578 (remarks of Sen. Cranston); *Oversight Hearings on the Rehabilitation Act of 1973: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 501-503 (1978) (statement of Rep. Hyde). See also S. Rep. No. 96-316, *supra*, at 13; 44 Fed. Reg. 17174 (1979); 45 Fed. Reg. 37628 (1980).

[32] As we noted above, note 8, respondent's claim for back pay survives LeStrange's death.

The petition in this case did not present any question about the kinds of monetary relief available in private actions under Section 504. Pet. i. The Court thus need not decide the difficult question whether punitive damages, as well as back pay, may be awarded if respondent ultimately prevails. The availability of the latter kind of relief alone would resolve the question of mootness.

In the 1978 amendments to the Rehabilitation Act, Congress explicitly granted handicapped *federal* employees the right to collect back pay under Section 501 (29 U.S.C. 791). Regarding the new Section 505(a)(1) (29 U.S.C. (Supp. V) 794a(a)(1)) the Senate report said:

> [A]pplication of title VII will make available "back pay" as a remedy for a handicapped individual when he or she is the prevailing party. A recent Supreme Court decision provided that back pay will not be provided as a remedy by the Federal Government unless specifically allowed by Federal statute (*United States* v. *Testan*, 424 U.S. 392 (1976)).

S. Rep. No. 95-890, *supra*, at 19.

Of course no such "specific[]" authorization was required in the case of suits against private funds recipients. Section 505(a)(1) was thus simply designed to *equalize* the treatment accorded federal employees (under Section 501) and private employees (under Section 504). As the Senate Committee on Labor and Human Resources noted in 1979:

> It is, and has always been the Committee's intent that any handicapped individual aggrieved by a violation of title V has the right under existing law to proceed privately in federal court to enforce the rights and remedies afforded under title V of the Rehabilitation Act of 1973, as amended, and to receive back pay and attorney's fees if successful.

S. Rep. No. 96-316, *supra*, at 12-13.

In *Guardians Ass'n* v. *Civil Service Comm'n*, No. 81-431 (July 1, 1983), a majority of this Court suggested that compensatory relief such as back pay could be available to private plaintiffs invoking Title VI against intentionally discriminatory conduct. Slip op. 15 (opinion of White, J.); slip op. 10-20 (Marshall, J., dissenting); slip op. 2-5 (Stevens, J., dissenting). In *Guardians* Justice White found that no compensatory relief was available because there had been no proof of intentional dis-

crimination.[33] In such cases, he pointed out, imposition of monetary awards could simply encourage a recipient to "terminate its receipt of federal money rather than assume the unanticipated burdens" (slip op. 14). By contrast (slip op. 15; footnote omitted):

> [i]n cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the state continues with the program.

In this case the complaint alleged that petitioner "has maliciously, willfully and purposely discriminated against the plaintiff since 1973, solely because the plaintiff is handicapped. Despite the fact that the plaintiff has at all times been ready, willing and able to return to gainful employment with Conrail, the defendant has refused to rehire the plaintiff as an engineer" (J.A. A8-A9). Although respondent denied that allegation (*id.* at A11), the district court made no findings relevant to the issue, and the court of appeals did not address it. Thus even if the "intent" standard that governed the Title VI compensatory claims in the Court's decision in *Guardians* is (by virtue of Section 505(a)(2), 29 U.S.C. 794a(a)(2)) equally applicable to Section 504, it remains open in this case for respondent to prove her entitlement to such relief.

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[33] Slip op. 19-20. Justice Rehnquist joined this portion of Justice White's opinion. Justice Powell, joined by the Chief Justice, concurred in the judgment of affirmance because they believed that no private right of action was available under Title VI (slip op. 2-3). Alternatively, they, joined by Justice Rehnquist, would have held that no Title VI relief was available absent a showing of intentional discrimination (*id.* at 4-5). Justice O'Connor concurred in the judgment because the petitioners had failed to prove intentional discrimination (slip op. 1-4).

IV. WHETHER RESPONDENT'S CLAIM CONCERNS A "PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE" IS AN ISSUE NOT PROPERLY PRESENTED TO THIS COURT

Petitioner argues (Br. 24-30) that the court of appeals failed to require a nexus between a specific federally assisted program and the denial of employment to respondent, thereby violating the "program-specific" nature of Section 504. In fact, the district court granted summary judgment without reaching this question, and the issue was therefore not before the court of appeals. Neither is it properly presented in this Court.

The evidence before the district court at the time petitioner moved for summary judgment showed that petitioner has received two kinds of federal financial assistance. First, the United States Railway Association ("USRA"), a government corporation established by the Regional Rail Reorganization Act of 1973, 45 U.S.C. (& Supp. V) 711 ("3R Act"), has purchased series A preferred stock and debentures from petitioner in the amount of $3.28 billion (J.A. A15-A17; 45 U.S.C. (& Supp. V) 726). These funds have been used in part to cover operating expenses not met by operating revenues (J.A. A15-A17; 45 U.S.C. 726(b)(1)(D)). Second, petitioner has received funds under Title V of the 3R Act (45 U.S.C. (& Supp. V) 771 *et seq.*), which provided certain benefits to railroad employees in order to protect them against the adverse consequences of consolidation.[34]

The district court granted petitioner's motion for summary judgment, holding simply that respondent lacked "standing" to sue under Section 504 (Pet. App. A46). That was so, the court concluded, because Section 504 does not forbid employment discrimination unless the primary purpose of the federal financial assistance was

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[34] Title V was repealed by the Northeast Rail Service Act of 1981 (Pub. L. No. 97-35, Title XI, Section 1144(a)(1), 95 Stat. 669), and was replaced by a new Title VII which affords protection to the same class of employees. 45 U.S.C. (Supp. V) 797 *et seq.*

to promote employment. Since, according to the district court, petitioner received no funding for that purpose (Pet. App. A37), respondent could not sue.[35] Having so decided, the court found it unnecessary to consider whether respondent had sought employment in a "program or activity" that received federal assistance.

The court of appeals did not hold that petitioner would be liable for discrimination even if it did not occur in a federally assisted program or activity.[36] Rather, the court disposed of the case in the same way this Court decided *North Haven*, *supra*, 456 U.S. at 539-540. The court simply held that Section 504 prohibited employment discrimination in federally assisted programs irrespective of the purpose of the federal assistance. It

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[35] The district court said that Section 504 also forbade employment discrimination if the harm done to one like petitioner caused discrimination against the primary beneficiaries of the federal aid (Pet. App. A33). That, however, did not happen here (*id.* at A45-A46).

The court's discussion of the employment coverage issue focused almost exclusively on the purpose of Title V. The only reference to the stock and debentures purchased by the USRA was an oblique statement that "the Act in general and Title VI in particular did not have a primary goal of providing employment" (*id.* at A37).

If the Court determines that Section 504 prohibits employment discrimination only where the federal financial assistance is intended primarily to provide employment, the case should be remanded for the court of appeals to review the district court's determination that the federal assistance received under Title V and through the USRA's purchase of stock and debentures was not primarily intended to provide employment. The court of appeals should also determine whether "providing employment" is limited, as the district court concluded (Pet. App. A35-A45), to providing new jobs, or whether it could include providing for the maintenance of existing jobs.

[36] It is true, as petitioner notes (Br. 26) that Judge Adams's concurrence relied in part on an earlier Third Circuit decision espousing an expansive view of the "program or activity" requirement of Title IX. Pet. App. A21-A22, citing *Grove City College* v. *Bell*, 687 F.2d 684 (3d Cir. 1982), cert. granted, No. 82-792 (Feb. 22, 1983). But neither Judge Bloch nor Judge Weis mentioned *Grove City* or discussed the "program or activity" question.

did not consider—nor did it have any factual basis for deciding—whether the discrimination alleged here had occurred in a federally assisted program or activity.

This Court, like the court of appeals, has no factual findings from the district court with which to address this question. It should therefore not decide it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JULY 1983

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No. 82-862-CFX
Status: GRANTED

Title: Consolidated Rail Corporation, Petitioner
v.
Lee Ann LeStrange Darrone, as Administratrix of Estate of Thomas LeStrange

Docketed:
November 22, 1982

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Rissetto, Harry A.

Counsel for respondent: Lenahan, Joseph P.

Entry	Date	Note	Proceedings and Orders
1	Nov 22 1982	G	Petition for writ of certiorari filed.
3	Dec 20 1982		Order extending time to file response to petition until January 17, 1983.
4	Jan 17 1983		Brief of respondent Thomas LeStrange in opposition filed.
5	Jan 19 1983		DISTRIBUTED. February 18, 1983
6	Feb 22 1983		Petition GRANTED.
			**********
8	Mar 16 1983		Order extending time to file brief of petitioner on the merits until May 9, 1983.
9	Mar 17 1983	N	Motion of Lee Ann LeStrange Darrone to be substituted as Administratrix of Estate of Thomas LeStrange, in place of respondent, Thomas LeStrange, deceased filed.
10	Mar 23 1983		DISTRIBUTED. April 15, 1983. (Above motion)
11	Apr 18 1983		Motion to substitute Lee Ann LeStrange Darrone, as Administratrix of Estate of Thomas LeStrange, in place of
12	Apr 18 1983		respondent, Thomas LeStrange, deceased, is granted.
13	May 9 1983		Brief amicus curiae of Equal Employment Advisory Council filed.
14	May 11 1983		Brief of petitioner Consolidated Rail Corp. filed.
15	May 11 1983		Joint appendix filed.
17	May 16 1983		Order extending time to file brief of respondent on the merits until July 11, 1983.
18	May 25 1983		Record filed.
19	May 25 1983		Certified original record & partial C.A. proceedings received.
20	May 27 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
21	Jun 13 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Jun 27 1983		Order further extending time to file brief of respondent on the merits until July 25, 1983.
23	Jul 6 1983		Brief amicus curiae of United States filed.
24	Jul 15 1983		Application for leave to file respondent's brief on the merits in excess of the page limits, and order denying
25	Jul 15 1983		same by White, J., on July 15, 1983.
26	Jul 15 1983		Order further extending time to file brief of respondent on the merits until July 30, 1983.
27	Jul 25 1983		Brief amicus curiae of American Federation of State, et al.

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Entry	Date	Note	Proceedings and Orders
			filed.
28	Jul 25 1983		Brief amicus curiae of Senator Alan Cranston, et al. filed.
29	Jul 29 1983		Brief amicus curiae of American Council of the Blind, et al. filed.
31	Jul 25 1983		Brief of respondent ~~Thomas~~ LeStrange filed.
32	Aug 16 1983		CIRCULATED.
33	Oct 17 1983		Lodging received entitled brief and appendix.
34	Oct 24 1983		SET FOR ARGUMENT. Tuesday, November 29, 1983. (2nd case) (1 hour)
35	Nov 18 1983	X	Reply brief of petitioner Consolidated Rail Corp. filed.
36	Nov 29 1983		ARGUED.